

2002  
ANNUAL REPORT  
OF THE  
APPEAL DIVISION

**For the period January 1 to December 31, 2002**

*WORKERS' COMPENSATION BOARD  
OF BRITISH COLUMBIA*

Submitted by:  
Jill Callan  
Chief Appeal Commissioner  
February 28, 2003

## TO: THE BOARD OF DIRECTORS

I am pleased to present the Annual Report of the Appeal Division for the year 2002. The Appeal Division is a separate and independent adjudicative body that was created on June 3, 1991. As a result of Bill 63, the Appeal Division will cease to operate on March 2, 2003. Over its history, the Appeal Division has issued approximately 24,000 decisions.

Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, received Royal Assent on October 31, 2002. Bill 63 amended the *Workers Compensation Act* (the *Act*) to establish two levels for review or appeal of decisions by officers of the Workers' Compensation Board (the Board). The first level is internal, involving a review by a review officer in the WCB Review Division. The second level is external, involving an appeal to the Workers' Compensation appeal Tribunal (WCAT). WCAT will be headed by a chair appointed by the Lieutenant Governor in Council. The Review Division and WCAT will be established effective March 3, 2003.

The Appeal Division experienced significant developments during 2002. The completion of Government's core review, production of the Core Services Review of the Workers' Compensation Board by Alan Winter, and the completion of the White Paper on Adjudicative Tribunals marked an important year in the development of compensation adjudication in British Columbia.

The Appeal Division received more matters and issued more decisions in 2002 than in any other year since its inception. In 2002, the division issued 3,185 decisions, which was a 22% increase over the 2,601 decisions issued in 2001.

The largest single category of decisions in 2002 involved appeals from Workers' Compensation Review Board (Review Board) findings. The Appeal Division received 2,260 appeals from Review Board findings in 2002 as opposed to 1,900 appeals in 2001.

John Steeves, who was the Chief Appeal Commissioner from March 6, 2000, left his employment at the Appeal Division on December 31, 2002 after nearly three years of committed and dedicated leadership. John was an active member of the Canadian Council of Administrative Tribunals (CCAT), the British Columbia Council of Administrative Tribunals (BCCAT) and the Circle of Chairs. John is recognized for his contribution to the worker's compensation appeal system and the administrative law community.

I commend the administrative staff of the division and the Appeal Commissioners for maintaining their focus and professionalism through a challenging period of transition in 2002. Throughout the year, they continued to be committed to issuing high quality decisions on a timely basis.

Jill Callan  
Chief Appeal Commissioner

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## 1. APPOINTMENTS AND REMUNERATION

There were several changes in the complement of Appeal Commissioners in 2002:

### New Appointments

- **Rob Kyle** was sworn in on April 22, 2002 as a non-representational Appeal Commissioner. Rob had been an employer-perspective representational Appeal Commissioner with the Appeal Division since January 18, 1999. Prior to his employment with the division, Rob was a self-employed registered professional forester and acted as an adjudicator on forest appeal boards from 1992.
- **Sarwan Boal** was sworn in on April 23, 2002 as a non-representational Appeal Commissioner. Sarwan had been a worker-perspective representational Appeal Commissioner with the Appeal Division since June 21, 1991. Prior to his employment with the division, Sarwan was the president of the Canadian Farmworkers' Union. He was also a member of the Federal Pesticide Registration Review Team that drafted a proposal for the revision of the Federal Pest Management Regulatory System.
- **Joanne Sajtos** was sworn in on August 1, 2002, as a non-representational Appeal Commissioner. Joanne has extensive experience in the workers' compensation appeal system as a Vice-Chair with the Ontario Workplace Safety and Insurance Appeal Tribunal (WSIAT). She was also Tribunal Counsel for WCAT (the predecessor of WSIAT) for eight years.
- **Gene Jamieson** was sworn in on August 26, 2002, as a non-representational Appeal Commissioner. Gene had previously been the assistant to the Chief Appeal Commissioner from 1995. Prior to his employment with the division, he was in private legal practice.

## Departures

- **John Steeves**, the Chief Appeal Commissioner from March 6, 2000, left the Appeal Division on December 31, 2002 after nearly three years of leadership. His contributions to the Appeal Division included conducting the first comprehensive review and revision of Appeal Division practice and procedure decisions. He also wrote leading cases and continued the trend of ensuring that quality decision-making was a hallmark of the division. John helped to maintain the Appeal Division's leadership profile in the administrative law community with his participation in the Administrative Justice Project, CCAT, BCCAT and the Circle of Chairs. He is a member of the CCAT Board of Directors, the program co-ordinator of the Circle of Chairs, a member of the Policy Development Committee of BCCAT and the co-ordinator for the national network of workers' compensation appeal tribunals. John is also a member of the Advisory Committee for Workplace Rights Tribunals with the Administrative Justice Project, Ministry of Attorney General.
- **Teresa White**, a non-representational Appeal Commissioner from November 23, 1998, left the Appeal Division effective December 16, 2002. Terri made a strong contribution to the Appeal Division, as her professional background in both law and medicine, coupled with sound writing skills, made her a respected adjudicator.
- **Roy Wong**, a worker-perspective representational Appeal Commissioner from September 12, 2001, left the Appeal Division effective December 31, 2002 in order to pursue other opportunities.
- **Glen Bell**, a non-representational Appeal Commissioner from March 20, 2001, left the Appeal Division effective December 31, 2002, in order to return to private legal practice.
- **Donna Gillis**, a non-representational Appeal Commissioner from September 12, 2001, left the Appeal Division effective May 2002. She accepted a position as Assistant Director General with the Board's Policy and Regulation Development Bureau. Donna brought significant experience to the Appeal Division as an adjudicator.

- **Gene Jamieson**, a non-representational Appeal Commissioner and previous Assistant to the Chief Appeal Commissioner, left the Appeal Division on October 11, 2002 to become the Legal Officer in the office of the Chief Judge of the Provincial Court of British Columbia. His legal knowledge, hard work and sense of humor added much to the Appeal Division.

As of January 1, 2003, the Appeal Division consisted of the Chief Appeal Commissioner, the Deputy Chief Appeal Commissioner, the Assistant Chief Appeal Commissioner and twenty-one Appeal Commissioners, as follows:

| Name | Term Expires |
|------|--------------|
|------|--------------|

**(a) Full-time, non-representational Appeal Commissioners**

|                     |                   |
|---------------------|-------------------|
| Steven Adamson      | June 29, 2003     |
| Sarwan Boal         | March 31, 2003    |
| Michael Carleton    | December 31, 2004 |
| Daphne Dukelow      | October 3, 2004   |
| Sonja Hadley        | December 31, 2004 |
| Cassandra Kobayashi | December 31, 2004 |
| Rob Kyle            | March 31, 2003    |
| Jane MacFadgen      | December 31, 2004 |
| Susan Marten        | April 7, 2003     |
| Heather McDonald    | September 6, 2004 |
| Herb Morton         | December 31, 2004 |
| Marguerite Mousseau | December 31, 2004 |
| Michael O'Brien     | November 13, 2003 |
| James Sheppard      | April 7, 2003     |
| Gail Starr          | December 31, 2004 |
| Don Sturrock        | June 16, 2003     |
| David Van Blarcom   | December 31, 2004 |

**(b) Part-time, non-representational Appeal Commissioners**

|                   |                   |
|-------------------|-------------------|
| Janet Patterson   | February 28, 2003 |
| Hilrie Reimer     | February 28, 2003 |
| Joanne Sajtos     | February 28, 2003 |
| Judith Williamson | February 28, 2003 |

Salaries for non-representational Appeal Commissioners in 2002 were \$94,781.

The Chief Appeal Commissioner, John Steeves, who managed the Appeal Division, sat as an Appeal Commissioner and as a non-voting member of the Panel of Administrators, had an annual salary of \$155,000.

The Deputy Chief Appeal Commissioner, Paul Petrie, was paid \$108,999 in 2002. Randy Lane, the Assistant Chief Appeal Commissioner, had an annual salary of \$99,050. The *per diem* rate for non-representational Appeal Commissioners was \$442 in 2002.

## **2. PLANNING, EDUCATION AND OTHER ACTIVITIES OF THE APPEAL DIVISION**

### **(a) Planning**

Information technology continued to play an important role in the Appeal Division's operations. All Appeal Division decisions from January 1, 2000 are available on the Board's website at [www.worksafebc.com/appeal\\_decisions](http://www.worksafebc.com/appeal_decisions).

The Appeal Division will continue to operate until March 2, 2003. On March 3, 2003, the Workers' Compensation Appeal Tribunal (WCAT) will become the final level of appeal as provided for in Bill 63.

A WCAT transitional team, which included several members of the Appeal Division's staff, worked diligently in 2002 to ensure that there would be a smooth transition to the new appeal tribunal.

### **(b) Educational Activities**

The Appeal Division continued its internal education program in 2002. The ongoing training, combined with external workshops and conferences, provided the Appeal Commissioners with updated legal and medical information with a focus on compensation and administrative law issues.

The Appeal Division's internal education committee, which was chaired by Marguerite Mousseau, and comprised of Sonja Hadley,

Jane MacFadgen, Heather McDonald, Gail Starr and Judith Williamson, organized the following educational events:

- Gene Jamieson and Joanne Sajtos led training sessions on Bills 49 and 63 in the spring and fall of 2002.
- On May 15, 2002, Walter Pylypchuk, a co-chair at the Labour Relations Board, presented a session on oral hearings.

External educational activities included the following:

- John Steeves, Steven Adamson, Sarwan Boal, Sonja Hadley, Rob Kyle, Jane MacFadgen, Susan Marten, Marguerite Mousseau Janet Patterson, Paul Petrie, Joanne Sajtos, Roy Wong and Martin Schmieg, the Appeal Division's legal researcher, attended the Seventh Annual Conference of the BCCAT on October 27 and 28, 2002. The title of the conference was "Administrative Justice: Charting the Course for British Columbia". In addition to several workshops that were offered, keynote speakers included Mr. Justice David Vickers, Supreme Court of British Columbia and the Honourable Geoff Plant, Attorney General of British Columbia and the Minister Responsible for Treaty Negotiations.
- John Steeves, Steven Adamson and Gene Jamieson attended the CCAT national conference on administrative justice in Ottawa from June 2 to 4, 2002. The theme of the conference was "The Maturing of Canada's Administrative Law System – An Accessible and Effective Way to Deliver Justice". John Steeves participated in a plenary session "Courts and Tribunals: Can We Work Better Together?" and he spoke at the sectoral workshop entitled "Workers' Compensation" with a focus on "Common Law and Statutory Powers to Reconsider".

**(c) Other Activities of the Appeal Commissioners**

- John Steeves met with various organizations to provide updates on the Appeal Division and discuss transitional issues:
  - The Canadian Labour Congress
  - The Labour Relations Board
  - The Canadian Institute for Administrative Justice (CIAJ)

John was a speaker at the BCCAT Conference. As a Panel member, John addressed the issue of "Administrative Justice in BC: After the White Paper and the Core Review". He also provided leadership and assistance to the WCAT transition team.

- At the BCCAT Conference, Paul Petrie received BCCAT's recognition award for his outstanding contribution in the field of Administrative Justice. He also attended the International Forum on Disability Management held in Vancouver on May 27 and 28, 2003.
- Daphne Dukelow continued to serve as a Board member and co-ordinator for the foundations course of the BCCAT. Daphne is currently organizing an instructor-training course for BCCAT.
- Judith Williamson co-instructed in the Foundations of Administrative Justice course sponsored by the BCCAT at the following locations: College of the Rockies in Cranbrook in February; BC Institute of Technology in May; general offering in Victoria in June, and Internal Review Section, Workers' Compensation Board in September. She also co-instructed in BCCAT's Advanced Decision-Writing Workshop presented to the Forest Practices Board in Victoria in March and the Workers' Compensation Review Board in November.
- At the BCCAT Conference, Janet Patterson was elected to the BCCAT Board of Directors. In September 2002, Janet co-instructed the BCCAT foundations course for Post-Secondary Educational Institutions at the BC Institute of Technology.
- Jim Sheppard attended the Continuing Legal Education Administrative Law Conference in October 2002. Topics at the conference included standards of review, the administrative justice project, Charter issues and natural justice.
- In addition to attending the BCCAT Conference, Marguerite Mousseau was a participant in a Continuing Legal Education workshop entitled "Pacific Legal Technology Conference".

- 
- Sarwan Boal spoke at an Advanced Workers' Compensation class at the Canadian Labour Congress Winter School in Harrison Hot Springs on January 31, and February 1, 2002. Sarwan attended BCCAT educational sessions on Advanced Oral Hearings, and Independence and Decision-Making. He also completed a special two-day course on advanced decision writing offered by CCAT.
  - Heather McDonald attended the Continuing Legal Education Administrative Law Conference in October 2002. Heather also attended a Continuing Legal Education Conference in May 2002 that marked the 20<sup>th</sup> anniversary of the proclamation of the Canadian Charter of Rights and Freedoms. Topics at the conference included the impact of the Charter on individual freedoms, social policy and economic rights, immigration issues, solicitor/client privilege and emerging issues in Charter jurisprudence.

### 3. MANAGEMENT AND ADMINISTRATION

On December 31, 2002, there were, in addition to the manager, 34 staff working in the Appeal Division. As well, the Appeal Division continued to provide four-month placements for law students from the co-operative program at the University of Victoria. The students provide support to the legal researcher and to the division.

The Appeal Division staff on December 31, 2002 were as follows:

|                      |                                                                                                                                                                                                                                                                                                                           |
|----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Manager              | Linda Hart                                                                                                                                                                                                                                                                                                                |
| Legal Researcher     | Martin Schmieg<br>(temporary to the position)<br>Rachel Maté (on leave)                                                                                                                                                                                                                                                   |
| Secretaries          | Carol Fox<br>Donna Hanson<br>Lisa Ross<br>Patricia Spannier                                                                                                                                                                                                                                                               |
| Intake Clerks        | Leah Nichol<br>Robyn Scott-Smith                                                                                                                                                                                                                                                                                          |
| File Clerk           | Jordy Tidmarsh                                                                                                                                                                                                                                                                                                            |
| Phone Control Clerks | Cynthia Huie<br>Laurie Lee<br>(temporary to the position)                                                                                                                                                                                                                                                                 |
| Appeal Officers      | Morag Brown<br>Shinder Dhaliwal<br>(temporary to the position)<br>Ursula Dixon<br>Bonnie Eisworth<br>Sharon Ertner<br>Linda Horvath<br>Heidi Kelly<br>(temporary to the position)<br>Janice Macrae<br>Brenda Provost<br>Andrew Roznicki<br>Doreen Russell<br>Valaine Sananin<br>(temporary to the position)<br>Anne Toews |

**Appeal Secretaries**

Kari Ardley  
(temporary to the position)  
Cindi Caldwell  
(temporary to the position)  
Diane Climie  
Claire Day  
Mae Elrick (on leave)  
Glenna Kari  
(temporary to the position)  
Aviva Perez  
Roz Royce  
(temporary to the position)  
Karen Tosoff  
(temporary to the position)  
Ivana Vukov  
(temporary to the position)  
Ria Wildeman  
(temporary to the position)  
Geselle Worobetz  
Jennifer Young  
(temporary to the position)

**4. EXPENDITURES**

The total Appeal Division budget for 2002 was \$4,631,137. The actual amount of expenditures for 2002 at year-end was \$ 4,594,880. The actual amount of expenditures in 2001 was \$4,507,371.

**5. PRACTICE AND PROCEDURE**

The following practice and procedure decision was issued under the authority of the Chief Appeal Commissioner in 2002:

**Delegation by the Chief Appeal Commissioner  
Appendix "O" to *Decision No. 33* (May 29, 2002)**

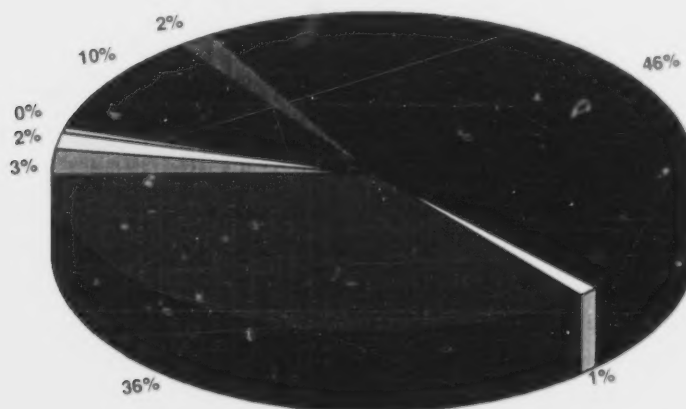
On June 1, 2002, Appendix "O" of *Decision No. 33* continued the appointments of Paul Petrie as Deputy Chief Appeal Commissioner and Randy Lane as Assistant Chief Appeal Commissioner.

## 6. NEW MATTERS

### (a) General

The Appeal Division received 4915 new appeals or other matters during 2002, for an average of 410 per month. This is an increase from the monthly average of 381 in 2001.

NEW MATTERS IN 2002 BY TYPE



|   |                                             |             |             |
|---|---------------------------------------------|-------------|-------------|
| ■ | Appeals from Review Board findings [s. 91]  | 2260        | 46%         |
| □ | Prevention [s. 73] (2)                      | 56          | 1%          |
|   | Bill 14 (54)                                |             |             |
| ■ | Employer Relief of Costs [s. 39(1) and ERA] | *1779       | 36%         |
| ■ | Assessments (90)                            | 127         | 3%          |
|   | Section 47(2) (37)                          |             |             |
| □ | Certificates for Court Action [s.11]        | 84          | 2%          |
| ■ | Criminal Injuries                           | 22          | 0%          |
| ■ | Extension of Time Requests                  | 494         | 10%         |
| ■ | All other matters:                          | 93          | 2%          |
|   | Review Board Referrals [s. 96.4] (2)        |             |             |
|   | Transfer of Claim Costs [s.10(8)] (3)       |             |             |
|   | Reconsideration Applications (88)           |             |             |
|   | Section 96.1 (84)                           |             |             |
|   | Section 96(2) (4)                           |             |             |
|   | <b>TOTAL NEW MATTERS</b>                    | <b>4915</b> | <b>100%</b> |

\* See comments regarding these 1779 appeals immediately after the following tables.

**APPEAL DIVISION INTAKE  
MONTHLY AVERAGE OF NEW MATTERS RECEIVED  
1992 TO 2002**

| <i><b>Time Period</b></i> | <i><b>Intake</b></i> | <i><b>Monthly Average</b></i> |
|---------------------------|----------------------|-------------------------------|
| 1992                      | 1992                 | 166                           |
| 1993                      | 2296                 | 191                           |
| 1994                      | 1860                 | 155                           |
| 1995                      | 2325                 | 194                           |
| 1996                      | 3056                 | 255                           |
| 1997                      | 4511                 | 376                           |
| 1998                      | 4764                 | 397                           |
| 1999                      | 5249                 | 437                           |
| 2000                      | 4757                 | 396                           |
| 2001                      | 4576                 | 381                           |
| 2002                      | 4915                 | 410                           |

## NEW MATTERS FILED TO THE APPEAL DIVISION BY YEAR

| <b>Matter Type</b>                                | <b>2002</b> | <b>2001</b> | <b>2000</b> | <b>1999</b> | <b>1998</b> | <b>1997</b> | <b>1996</b> | <b>1995</b> | <b>1994</b> | <b>1993</b> | <b>1992</b> |
|---------------------------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Section 91 appeals from Review Board              | 2260        | 1899        | 1610        | 1630        | 1745        | 1590        | 1482        | 1475        | 1200        | 1429        | 1206        |
| Section 96(4) President's referrals               | 2           | 4           | 9           | 6           | 4           | 3           | 7           | 7           | 2           | 4           | 1           |
| Prevention – general                              | 2           | 4           | 1           | 52          | 102         | 94          | 121         | 120         | 171         | 155         | 179         |
| O.H.S. (Bill 14)                                  | 54          | 92          | 72          | 20          | NA/         | N/A         | N/A         | N/A         | N/A         | N/A         | N/A         |
| Section 39(1) employer relief of costs            | 1779        | 1924        | 2470        | 2967        | 2355        | 2286        | 942         | 151         | 131         | 387         | 219         |
| Criminal injury matters                           | 22          | 49          | 70          | 65          | 84          | 83          | 44          | 32          | 46          | 12          | 6           |
| Section 47(2) employer charged with costs         | 37          | 43          | 35          | 34          | 17          | 22          | 42          | 20          | 14          | 16          | 19          |
| Assessments                                       | 90          | 62          | 86          | 73          | 53          | 61          | 66          | 201         | 110         | 118         | 85          |
| Ombudsman (reconsideration)                       | 0           | 0           | 0           | 0           | 1           | 0           | 0           | 0           | 1           | 1           | 26          |
| Section 10(8) transfer of claim costs             | 3           | 1           | 5           | 6           | 10          | 1           | 10          | 8           | 11          | 5           | 10          |
| Section 11 certificates                           | 84          | 100         | 97          | 112         | 85          | 78          | 78          | 55          | 74          | 84          | 86          |
| Reconsideration - Appeal Division decisions       | 84          | 39          | 67          | 49          | 36          | 50          | 43          | 59          | 93          | 69          | 64          |
| Reconsideration - former commissioners' decisions | 4           | 1           | 3           | 1           | 4           | 8           | 2           | 13          | 7           | 15          | 34          |
| Extension of time to appeal                       | 494         | 358         | 232         | 234         | 268         | 235         | 219         | 184         | *           | *           | 31          |
| Miscellaneous                                     | 0           | 0           | 0           | 0           | 0           | 0           | 0           | 0           | 0           | 1           | 26          |
| <b>TOTAL</b>                                      | <b>4915</b> | <b>4576</b> | <b>4757</b> | <b>5249</b> | <b>4764</b> | <b>4511</b> | <b>3056</b> | <b>2325</b> | <b>1860</b> | <b>2296</b> | <b>1992</b> |

\* Extension of time applications were included in the figures for each matter type in 1993 and 1994

The Appeal Division received 7% more new matters (339) in 2002 than were received in 2001. This increase is attributable to the 19% rise in the number of Review Board appeals received in 2002 compared to 2001. The 2,260 appeals received from Review Board findings in 2002 is the highest number of such appeals received in any year since the Appeal Division's inception in 1991. Appeals from relief of cost decisions continue to rank slightly behind Review Board appeals in terms of overall volume. These two types of appeals represent 82% of all new matters filed with the Appeal Division in 2002.

The Appeal Division experienced a decrease in the number of appeals received relating to occupational health and safety prevention matters, section 47(2) appeals related to employers charged with costs, and President's referrals under section 96(4). The number of section 11 certificates requested of the Appeal Division in 2002 also decreased. The Appeal Division received fewer applications in 2002 compared to the previous year in the area of criminal injury compensation. Assessment appeals and requests for reconsideration of Appeal Division decisions also increased. There was a 38% increase in the number of applications for an extension of time to appeal to the Appeal Division in 2002 compared to 2001.

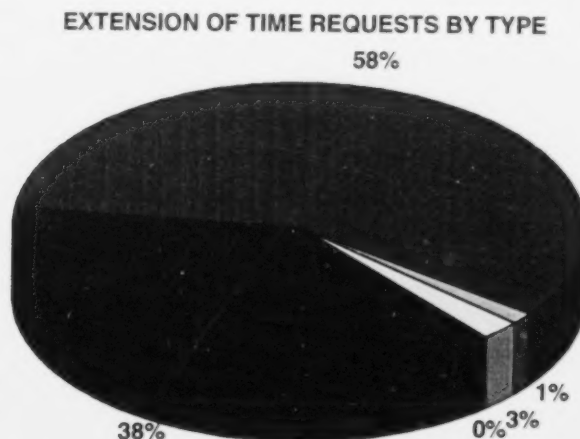
The number of employer relief of claim costs appeals under section 39(1)(e) has been significant since the second half of 1996. During the five years from the inception of the Appeal Division in June 1991 to June 1996, the Appeal Division received 953 appeals under section 39(1)(e). This contrasts with the 14,658 received during the six and one-half years from July 1, 1996 to the end of 2002.

The dramatic change in the number of 39(1)(e) appeals can be traced to the June 11, 1996 resolution of the Panel of Administrators which implemented recommendations of the provincial Information and Privacy Commissioner, effective July 1, 1996. One recommendation was that employers not receive full disclosure of workers' claim files until an appeal has been filed. Prior to the change of policy, employers were provided full disclosure of claim files once an appealable decision was made. With the change of policy, an employer must first initiate an appeal before full disclosure is provided.

As a consequence, the vast majority of 39(1)(e) appeals from 1997 to 2002 were withdrawn before an Appeal Division Panel was required to rule on the appeal. Of the 13,599 employer relief of claim costs appeals dealt with by the Appeal Division from 1997 to the end of 2002, appeals totaling 12,203 (90%) were withdrawn prior to an Appeal Division Panel having to adjudicate on the appeal. While this significant number of withdrawals has held for a number of years, there is some indication from the Appeal Division's experience in 2002 that the number of cases proceeding to decision is increasing significantly. In this regard, the Appeal Division dealt with 1,786 employer relief of costs appeals from July 1, 2002 to December 31, 2002. Of those matters, 1,355 (76%) were withdrawn, while 431 (24%) proceeded to a decision by the Appeal Division Panel.

### (b) Requests for an extension of time to appeal

In 2002, 494 applications were received for an extension of the 30 day time limit for appealing to the Appeal Division.



|                                                |     |      |
|------------------------------------------------|-----|------|
| ■ Review Board s. 91                           | 188 | 38%  |
| ■ Relief of claim costs                        | 287 | 58%  |
| ■ Employers charged with costs – section 47(2) | 6   | 1%   |
| □ Assessments                                  | 12  | 3%   |
| ■ Transfer of Claim Costs                      | 1   | 0%   |
| <hr/>                                          |     |      |
| Total                                          | 494 | 100% |

The number of extension of time requests in 2002 represents a 38% increase from the number of such requests received in 2001 (358). The Appeal Division received 232 such requests in 2000, 234 in 1999, 268 in 1998, 235 in 1997 and 219 in 1996.

### (c) Review Board appeals

During 2002, the Appeal Division received 2260 appeals from Review Board findings, a monthly average of approximately 188. This represents a 19% increase from the number of such appeals received by the Appeal Division in 2001 (1899). The 2260 appeals represents the largest number of such appeals received in any year since the inception of the Appeal Division in 1991.

The 2260 appeals from Review Board findings represent 15% of the total number of Review Board decisions (Panel findings and summary decisions) in 2002. This is consistent with the range of total Review Board decisions received by the Appeal Division in 2001 (15%), 2000 (15%), 1999 (15%), 1998 (16%), 1997 (14%) and 1996 (15%). The percentage remained in the range of 17% to 21% from 1993 to 1995.

### (d) Employers' appeals or applications

2771 of the new matters initiated to the Appeal Division in 2002 were brought by employers. There was a 33% increase in employer appeals of Review Board findings in 2002 compared to 2001. Overall, employers filed 4.4% more appeals in 2002 compared to 2001. As well as the above-mentioned increase in Review Board findings there was a 72% increase in extension of time applications. There was, however, an 8% decrease in the relief of costs appeals in 2002.

#### Employer appeals or applications in 2002 by type

| <b>Type</b>                                            | <b>Number</b> |
|--------------------------------------------------------|---------------|
| Employer appeals of Review Board findings              | 439           |
| Prevention appeals                                     | 2             |
| O.H.S. (Bill 14)                                       | 51            |
| Employer relief of costs appeals                       | 1779          |
| Employer charged with costs -<br>Section 47(2) appeals | 37            |
| Assessment appeals                                     | 90            |
| Transfer of claim costs<br>Section 10(8) appeals       | 3             |
| Reconsideration applications                           | 25            |
| Extension of time requests                             | 345           |
| <b>Total</b>                                           | <b>2771</b>   |

Employers' appeals or applications in 2001 totalled 2654 which was comprised of: 330 appeals of Review Board findings; 75 prevention/Bill 14 appeals; 1924 relief of costs appeals; 43 appeals by employers charged with costs; 62 assessment appeals; 1 section 10(8) appeal; 18 reconsideration applications; and 201 extension of time requests.

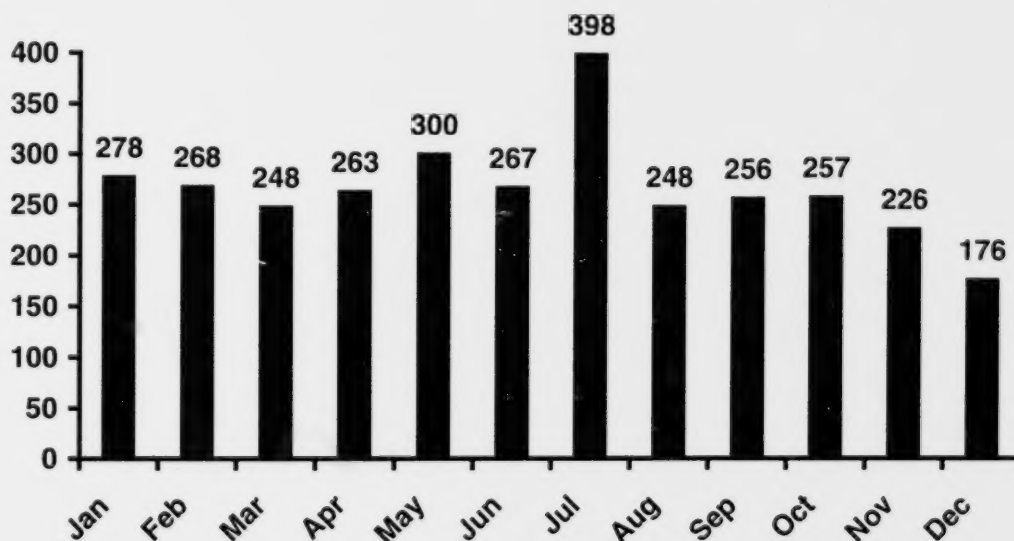
## 7. DECISIONS OF THE APPEAL DIVISION

### (a) General

There were 3185 decisions rendered by the Appeal Division in 2002, an average of 265 per month. This is the highest number of decisions the Appeal Division has issued in a calendar year since the division's creation in 1991. It represents a 23% increase over the number of decisions issued in 2001 (2601).

In addition to the 3185 decisions in 2002, there were 1842 matters that were withdrawn or rejected on a preliminary basis, and 303 matters were withdrawn to facilitate other action outside the Appeal Division. In total, there were 5330 matters dealt with during 2002.

### DECISIONS OF THE APPEAL DIVISION BY MONTH



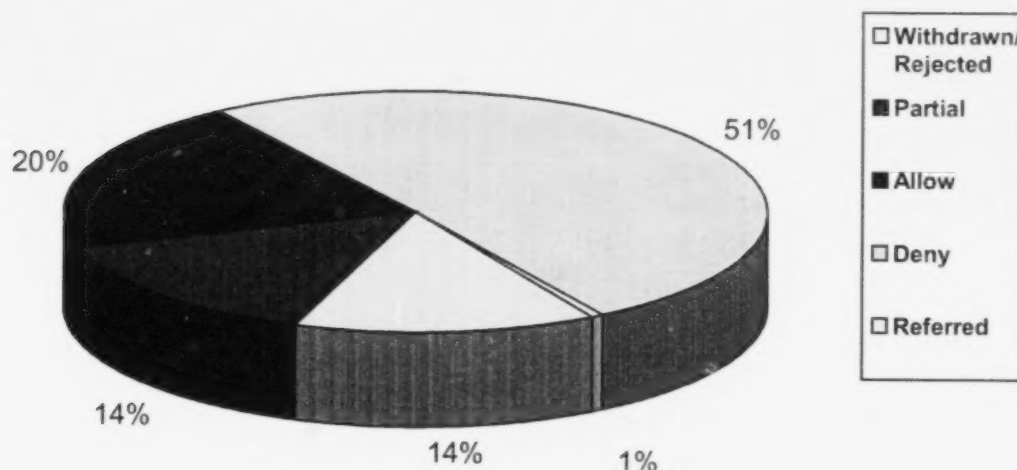
## DECISIONS OF THE APPEAL DIVISION BY YEAR

| <b>Matter Type</b>                                | <b>2002</b> | <b>2001</b> | <b>2000</b> | <b>1999</b> | <b>1998</b> | <b>1997</b> | <b>1996</b> | <b>1995</b> | <b>1994</b> | <b>1993</b> | <b>1992</b> |
|---------------------------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Section 91 appeals from Review Board              | 1927        | 1609        | 1361        | 1374        | 1433        | 1192        | 1320        | 1053        | 1067        | 1304        | 1247        |
| Section 96(4) President's referrals               | 5           | 4           | 5           | 6           | 1           | 2           | 9           | 4           | 3           | 2           | 2           |
| Prevention – general                              | 6           | 1           | 17          | 81          | 69          | 96          | 93          | 106         | 140         | 159         | 301         |
| O.H.S. (Bill 14)                                  | 81          | 62          | 30          | N/A         | N/A         | N/A         | N/A         | N/A         | N/A         | N/A         | N/A         |
| Section 39(1) employer relief of costs            | 431         | 408         | 209         | 108         | 107         | 128         | 83          | 87          | 89          | 130         | 212         |
| Criminal injury matters                           | 18          | 71          | 110         | 97          | 77          | 51          | 40          | 29          | 40          | 14          | 0           |
| Section 47(2) employer charged with costs         | 25          | 19          | 23          | 22          | 9           | 23          | 27          | 14          | 11          | 13          | 22          |
| Assessments                                       | 31          | 45          | 29          | 34          | 31          | 35          | 164         | 46          | 62          | 72          | 86          |
| Section 10(8) transfer of claim costs             | 2           | 1           | 2           | 10          | 0           | 1           | 2           | 1           | 5           | 1           | 6           |
| Section 11 certificates                           | 44          | 63          | 48          | 49          | 53          | 41          | 53          | 41          | 39          | 51          | 58          |
| Reconsideration - Appeal Division decisions       | 78***       | 56          | 64          | 38          | 44          | 48          | 44          | 49          | 55          | 29          | 15          |
| Reconsideration - former commissioners' decisions | 3***        | 3           | 3           | 7           | 5           | 9           | 11          | 12          | 16          | 29          | 56          |
| Extension of time to appeal                       | 452         | 212         | 134         | 185         | 201         | 140         | 119         | 139         | *           | *           | *           |
| Preliminary matters                               | 82          | 47          | 42          | 10          | 2           | 4           | 5           | 2           | *           | *           | *           |
| <b>TOTAL</b>                                      | <b>3185</b> | <b>2601</b> | <b>2077</b> | <b>2021</b> | <b>2032</b> | <b>1770</b> | <b>1970</b> | <b>1583</b> | <b>1527</b> | <b>1804</b> | <b>2005</b> |

\* Extension of time and other preliminary decisions were included in the number of decisions for each appeal matter type.

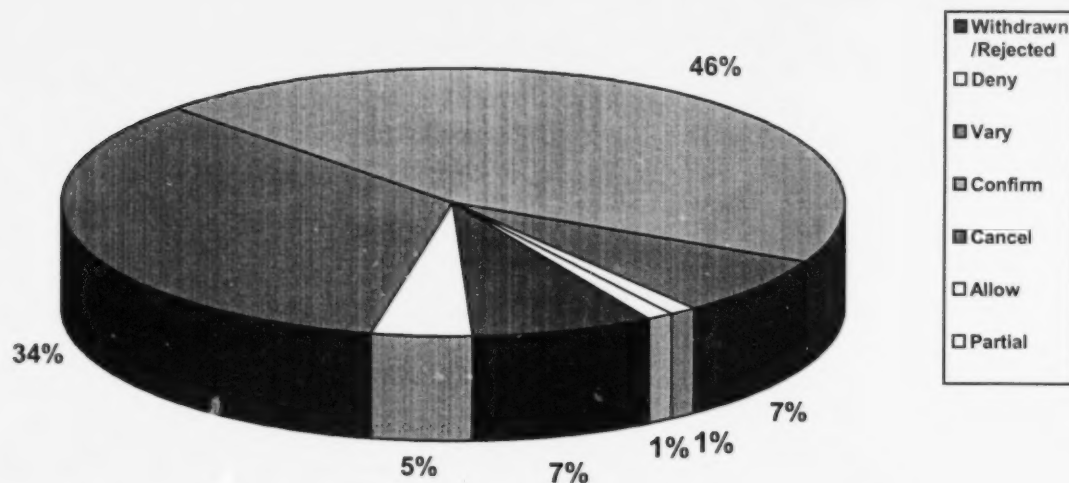
\*\* In some instances these total figures differ slightly with the total number of decisions indicated in each year's annual report (variance of 0 for 2000 and 2001, and 1 for 1999, to a high variance of 14 for 1992). This may have been caused by the introduction and revision over time of the Division's computerized appeal tracking system.

\*\*\* These figures include the preliminary decisions regarding applications for reconsideration.

**(b) Appeals from Review Board findings**

| <b>Disposition</b> | <b>Number</b> | <b>Percentage</b> |
|--------------------|---------------|-------------------|
| Withdrawn/Rejected | 313           | 14                |
| Decisions (1927)   |               |                   |
| Partial            | 322           | 14                |
| Allow              | 458           | 20                |
| Deny               | 1134          | 51                |
| Referred           | 13            | 1                 |
| <b>Total</b>       | <b>2240</b>   | <b>100</b>        |

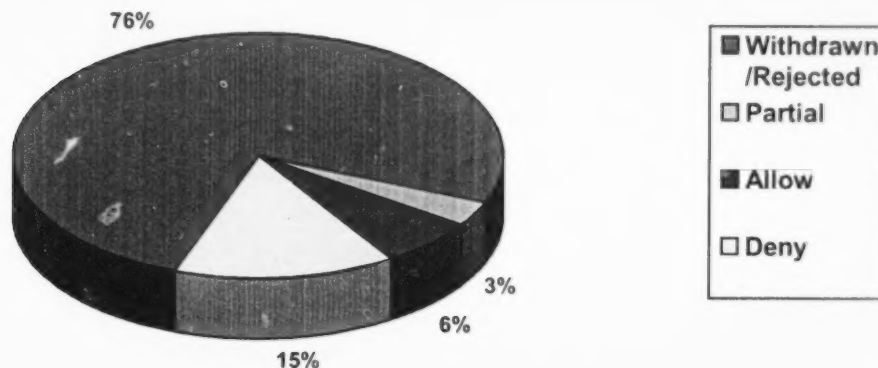
|                                                  |      |
|--------------------------------------------------|------|
| Pending at the end of 2001                       | 997  |
| New applications in 2002                         | 2260 |
| Total for consideration                          | 3257 |
| Total completions<br>(withdrawals and decisions) | 2240 |
| Pending as of December 31, 2002                  | 1017 |

**(c) Prevention (including Bill 14 matters)**

| <b>Disposition</b> | <b>Number</b> | <b>Percentage</b> |
|--------------------|---------------|-------------------|
| Withdrawn/Rejected | 7             | 7                 |
| Decisions (87)     |               |                   |
| Deny               | 4             | 5                 |
| Vary               | 32            | 34                |
| Confirm            | 42            | 45                |
| Cancel             | 7             | 7                 |
| Allow              | 1             | 1                 |
| Partial            | 1             | 1                 |
| <b>Total</b>       | <b>94</b>     | <b>100</b>        |

|                                                  |     |
|--------------------------------------------------|-----|
| Pending at the end of 2001                       | 60  |
| New applications in 2002                         | 56  |
| Total for consideration                          | 116 |
| Total completions<br>(withdrawals and decisions) | 94  |
| Pending as of December 31, 2001                  | 18  |

(d) **Relief of claim costs**  
(under section 39, and for experience rating purposes under section 42)

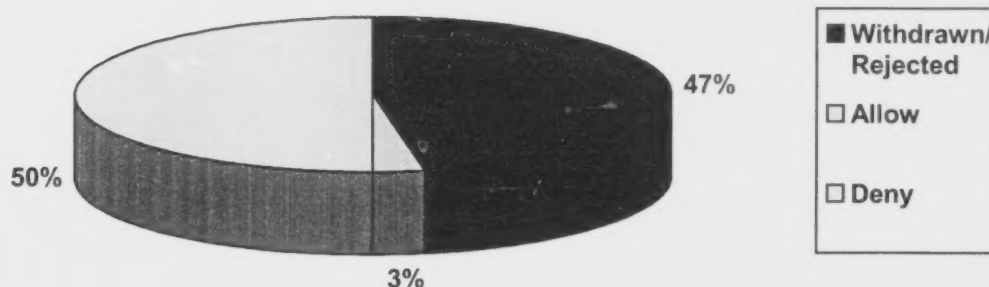


| <i><b>Disposition</b></i> | <i><b>Number</b></i> | <i><b>Percentage</b></i> |
|---------------------------|----------------------|--------------------------|
| Withdrawn/Rejected        | 1335                 | 76                       |
| Decisions (431)           |                      |                          |
| Partial                   | 59                   | 3                        |
| Allow                     | 111                  | 6                        |
| Deny                      | 260                  | 15                       |
| Referred                  | 1                    | 0                        |
| <b>Total</b>              | <b>1766</b>          | <b>100</b>               |

|                                                  |      |
|--------------------------------------------------|------|
| Pending at the end of 2001                       | *670 |
| New applications in 2002                         | 1779 |
| Total for consideration                          | 2455 |
| Total completions<br>(withdrawals and decisions) | 1766 |
| Pending as of December 31, 2002                  | 689  |

\* Includes adjustment from 2001 annual report.

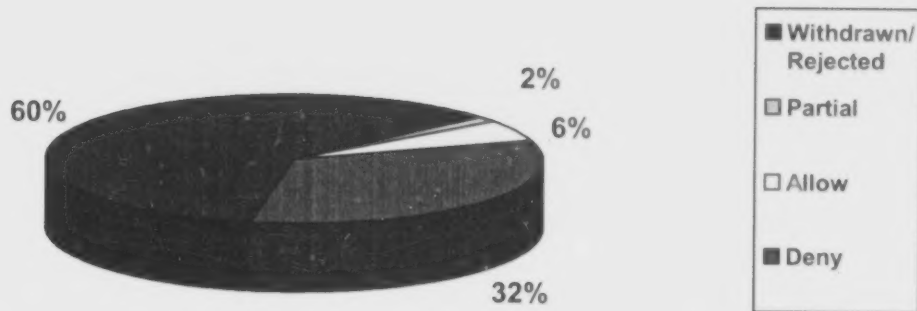
(e) Appeals by unregistered employer charged with claim costs under section 47(2)



| <b>Disposition</b> | <b>Number</b> | <b>Percentage</b> |
|--------------------|---------------|-------------------|
| Withdrawn/Rejected | 10            | 28                |
| Decisions (25)     |               |                   |
| Allow              | 2             | 6                 |
| Deny               | 23            | 66                |
| <b>Total</b>       | <b>35</b>     | <b>100</b>        |

|                                                  |     |
|--------------------------------------------------|-----|
| Pending at the end of 2001                       | *22 |
| New applications in 2002                         | 37  |
| Total for consideration                          | 56  |
| Total completions<br>(withdrawals and decisions) | 35  |
| Pending as of December 31, 2002                  | 21  |

\* Includes adjustment noted in 2001 annual report.

**(f) Assessment appeals**

| <i><b>Disposition</b></i> | <i><b>Number</b></i> | <i><b>Percentage</b></i> |
|---------------------------|----------------------|--------------------------|
| Withdrawn/Rejected        | 46                   | 60                       |
| Decisions (31)            |                      |                          |
| Partial                   | 1                    | 2                        |
| Allow                     | 5                    | 6                        |
| Deny                      | 25                   | 32                       |
| <b>Total</b>              | <b>77</b>            | <b>100</b>               |

|                                                  |     |
|--------------------------------------------------|-----|
| Pending at the end of 2001                       | 26  |
| New applications in 2002                         | 90  |
| Total for consideration                          | 116 |
| Total completions<br>(withdrawals and decisions) | 77  |
| Pending as of December 31, 2002                  | 39  |

**(g) Transfer of claim cost – section 10(8)**

The Appeal Division issued two decisions during 2002 on appeals from Board officer decisions under section 10(8). One decision denied the appeal and the other partially allowed the appeal. The Appeal Division received three new appeals in 2002. There were two section 10(8) appeals pending before the Appeal Division at the end of 2002.

**(h) Section 11 certificates for legal actions**

The Appeal Division rendered 44 decisions during 2002 on applications under section 11 for a certificate for filing in a legal action. Written reasons were provided by the Appeal Division for each decision rendered, together with a certificate for filing in the Supreme Court of British Columbia.

|                                 |     |
|---------------------------------|-----|
| Pending at the end of 2001      | 133 |
| New applications in 2002        | 84  |
| Total for consideration         | 217 |
| Total completions               | 85  |
| Withdrawals & Rejections (41)   |     |
| Decisions (44)                  |     |
| Pending as of December 31, 2002 | 132 |

In 2001, the Appeal Division made 63 decisions on section 11 applications, 48 in 2000, 49 in 1999, 53 in 1998, 41 in 1997, 53 in 1996, 41 in 1995, and 39 in 1994.

**(i) Criminal Injury Compensation Act**

The Appeal Division issued 59 decisions in 2002 on review applications under the *Criminal Injury Compensation Act*. Leave was granted in 15 cases, denied in 24 cases and partially allowed in two cases. Eighteen decisions were made after a review on the merits, resulting in 14 applications allowed, two denied, one partially allowed and one referred back to Criminal Injury Compensation Program. In addition, seven

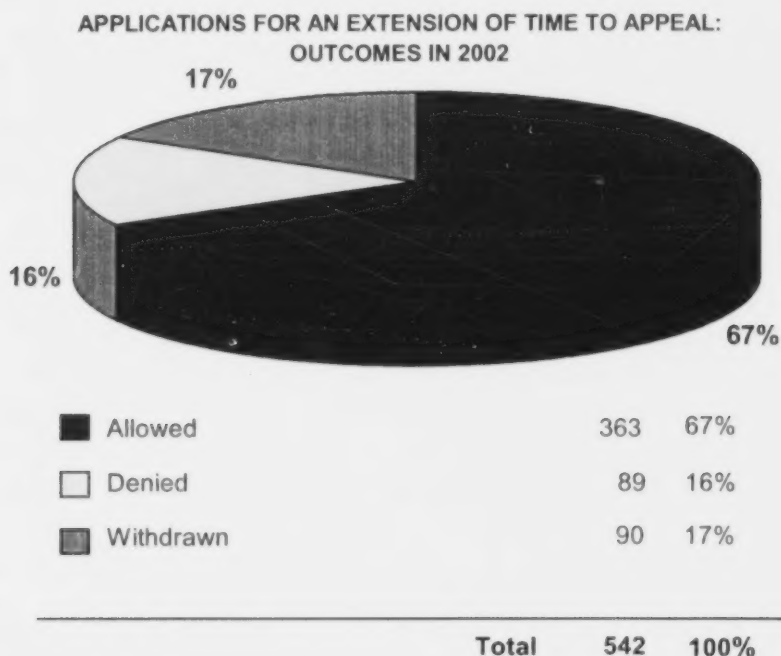
decisions were made on applications for reconsideration of an Appeal Division decision under the *Criminal Injury Compensation Act*. The applications were denied in each case.

The Appeal Division issued 74 decisions in 2001 on review applications under the *Criminal Injury Compensation Act*, 113 decisions in 2000, 97 decisions in 1999, 77 decisions in 1998, 51 decisions in 1997, 40 decisions in 1996, and 29 decisions in 1995.

#### **(j) Preliminary dispositions**

The Appeal Division issued written reasons on 613 preliminary matters in 2002. These 613 decisions on preliminary matters included 452 decisions on applications for extension of time to appeal, 17 applications for a stay, and one related to appeal time limits in relation to occupational health and safety penalties. Decisions were also issued on preliminary matters related to seven Review Board appeals, five Employer Relief of Costs appeals, one Section 96(4) referral and one Section 11 determination.

The following chart represents the results on applications for an extension of time to appeal in 2002. As noted in the chart, there were 90 withdrawals of requests for an extension of time in 2002.



The 452 extension of time to appeal decisions are noted in the following table according to the type of matter to which the decision relates and outcomes of those decisions:

| <i><b>Type of Matter</b></i>   | <i><b>Allow</b></i> | <i><b>Deny</b></i> | <i><b>Total</b></i> |
|--------------------------------|---------------------|--------------------|---------------------|
| Section 91(1) appeals          | 101                 | 58                 | <b>159</b>          |
| Prevention                     | 0                   | 0                  | <b>0</b>            |
| Employer relief of claim costs | 259                 | 26                 | <b>285</b>          |
| Employer charged with costs    | 3                   | 1                  | <b>4</b>            |
| Assessments                    | 0                   | 3                  | <b>3</b>            |
| Transfer of Claim Costs        | 0                   | 1                  | <b>1</b>            |
| <b>Total</b>                   | <b>363</b>          | <b>89</b>          | <b>452</b>          |

## (k) Reconsideration applications

### (i) General

There were 79 reconsideration decisions issued by the Appeal Division in 2002. Three related to former commissioner decisions and 76 dealt with Appeal Division decisions.

#### DECISIONS RENDERED ON APPLICATIONS FOR RECONSIDERATION, BY YEAR

| <b>Year</b> | <b>Former<br/>Commissioners'<br/>Decisions</b> | <b>Appeal<br/>Division<br/>Decisions</b> |
|-------------|------------------------------------------------|------------------------------------------|
| 1992        | 56                                             | 15                                       |
| 1993        | 29                                             | 29                                       |
| 1994        | 16                                             | 55                                       |
| 1995        | 12                                             | 49                                       |
| 1996        | 11                                             | 44                                       |
| 1997        | 9                                              | 48                                       |
| 1998        | 5                                              | 44                                       |
| 1999        | 7                                              | 38                                       |
| 2000        | 3                                              | 62                                       |
| 2001        | 3                                              | 53                                       |
| 2002        | 3                                              | 76                                       |

### (ii) Decisions of the former commissioners

The Appeal Division continues to have jurisdiction over decisions made by the former commissioners prior to 1991. A British Columbia Supreme Court decision in 2001, *Atchison v. Workers' Compensation Board* (29 November 2001), confirmed an Appeal Division decision that articulated temporal limits on the reconsideration of former commissioners' decisions on the basis of new evidence. The *Atchison* decision was appealed to the British Columbia Court of Appeal and the appeal was heard on December 19, 2002. At the time of writing this report, the Court of Appeal had not yet rendered its judgment.

The three Appeal Division decisions regarding applications to reconsider former commissioner decisions are noted below:

- **Medical Review Panel Certificate and Commissioner Decision**  
**Decision No. 2002-1797**

The worker injured his back in September 1981. In a decision dated February 23, 1990 and reconsidered on September 7, 1990, the former commissioners denied the worker's request for further benefits. A Medical Review Panel (MRP) also considered the matter on September 3, 1981.

The Reconsideration Panel concluded that it lacked jurisdiction to consider the application to reconsider the former commissioners' decision. It was held that the MRP certificate had "overtaken and superseded" the former commissioner's decision; this certificate was final and binding on the Board and the Appeal Division. The *Act* did not "provide the Appeal Division with the authority to reconsider a conclusive and binding MRP certificate."

- **Legislation Not in Existence at the Time of the Commissioners' Decision**  
**Decision No. 2002-2482**

The granddaughter of a deceased worker applied for a reconsideration of a March 1959 Board decision under the new evidence section of the *Act*. Alternatively, she applied on the basis that the refusal of the Board to accept the worker's claim for compensation was an error of law or breach of the *Canadian Charter of Rights and Freedoms*.

The Reconsideration Panel held that the matter concerned an application to reconsider a former Board of Commissioners' decision, and therefore, section 96.1 had no direct application on the question of review. The Panel found that the transition provisions, section 17(5) of the *Workers Compensation Amendment Act*, 1989 (Bill 27), only apply to decisions made under sections 91 or 96 of the *Workers Compensation Act*, as it read immediately before the amendments

came into force. At paragraph 50, the Reconsideration Panel concluded:

...that a correct reading of the 1989 transition provisions requires a focus on the legislation that existed "immediately" before the 1989 transition provisions. The use of "immediately" leads to a conclusion that the intent was to refer only to the legislation before 1989 and not all previous legislation; the intent was to provide for a specific and finite period of time immediately before the 1989 legislation came into force.

The granddaughter also submitted that the claim should be reconsidered in accordance with the protections against discriminatory actions. The Reconsideration Panel noted that the protection against discriminatory action in the *Act* came into force on October 1, 1999 and, therefore, was not applicable to this case. In reviewing whether the Commissioners' decision contained an error of law going to jurisdiction, the Panel applied a standard of patently unreasonableness to determine if there was "evidence that is reasonably capable of supporting the finding". Upon reviewing the evidence, the Panel could not find that the prior decision amounted to an error of law going to jurisdiction.

- **New Evidence**

***Decision No. 2002-3120***

The worker sought reconsideration of Board of Commissioners' decisions dated July 6, 1983 and May 16, 1986. The Board of Commissioners denied the claim on July 6, 1983 on the basis that there was a lack of objective medical evidence. New medical evidence was provided and the Commissioners reconsidered the decision on May 16, 1986 and again concluded that there was insufficient objective medical evidence that the worker's ongoing symptoms were due to the compensable accident.

The Reconsideration Panel stipulated that the Appeal Division has the authority to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991. This power of review is

available in instances where "the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*". However, the Reconsideration Panel rejected the application for reconsideration of the July 1983 decision on the ground that the decision had been previously reconsidered by the Commissioners and the Appeal Division did not have jurisdiction to reconsider a decision that has already been reconsidered.

The Reconsideration Panel determined that the application for reconsideration of the May 1986 decision of the Commissioners should fail based on a consideration of whether there was an error of law going to jurisdiction. The Reconsideration Panel concluded that the test was whether "the evidence is reasonably capable of supporting the Commissioners' decision" and that it is not "available to me to substitute my opinion of how the evidence should have been weighed". In the Reconsideration Panel's view, the decision met the above noted test.

### **(iii) Appeal Division Reconsideration Decisions**

As noted above, 76 applications for reconsideration of Appeal Division decisions were considered in 2002. The following cases highlight some of the grounds and issues considered by the Appeal Division Reconsideration Panels:

- **Disclosure of Evidence**  
***Decision No. 2002-3098***

The employer requested that the Appeal Division decision be reconsidered on the ground that a psychological report that was referred to in the impugned decision had not been disclosed to the employer prior to the Panel's rendering of its decision.

The Reconsideration Panel found that the Panel in *Decision No. 2001-2560* made reference to and relied on the psychological report in question. It was concluded that there was a breach of the principles of natural justice, based on a standard of "correctness", for the following reasons:

The principles of natural justice are intended to ensure a fair consideration by a decision-making body of every side of the case before it. Fair consideration entails hearing all the arguments presented. For the parties about to be affected by a decision to be in a position to bring their arguments to bear on the decision-making process, they must know the case to be met. Without knowledge of the matters in issue and the information available to the decision-maker, affected parties cannot exercise their right to be heard meaningfully. Therefore, they are entitled to know any information in the hands of the decision-maker that is relevant and possibly prejudicial to their interests.

- **Amendments to Schedule "B" and Policy  
*Decision No. 2002-2572***

The worker claimed compensation for shoulder tendonitis on December 27, 1999, which arose on December 10, 1999. The Appeal Division Panel considered policy #27.20 from the *Rehabilitation Services and Claims Manual* (RSCM) dated December 1999 as authority in determining whether the work had been of causative significance.

The Panel of Administrators amended policy #27.20 and approved a change to item #13(b) of Schedule B of the *Act* by Resolution dated December 17, 1999. The Resolution took effect thirty days after publication in the *British Columbia Gazette*, Part II Vol. 43 No. 3. Consequently, the changes to Policy #27.20 and Schedule B were not in effect and could not be considered until March 29, 2000.

Applying a "patently unreasonable" standard, the Reconsideration Panel found there was an error of law going to jurisdiction in the original Appeal Division decision. The Reconsideration Panel stated that the confusion may have arisen due to the date on the policy, which was not consistent with its effective date. The Panel provided the following comments and recommendations:

... As above the date published with item #27.20 in the Manual coincides with the date of the Panel resolution, December 1999. I say "coincides" because other explanations are also possible. A review of various releases of amendments to the Manual suggests that the date in the "footer" of the Manual may also be the date of an administrative action to record the change in policy. I also note that the changes to item #27.20 were issued in August 2000 so the date recorded in the Manual does not appear to relate to the date of release to the public. In short, the dates published in the Manual as "footers" may have some unknown administrative function but they do not represent the effective date of policy. Finally, at least some policy includes a statement about when the policy is effective (see item #39.44, for example).

There is no information regarding the effective date of the specific policy in the Manual and, in fact, the information in the Manual is misleading. Yet this information is critical to the proper adjudication of claims and appeals. And it may be unrealistic to expect some members of the workers' compensation community to be able to track changes in policy through Panel resolutions and even the *Gazette*. It is not clear what value there is in publishing policy with the date of some unknown administrative function but there is considerable value in publishing policy with actual effective dates. This is especially true when there are significant and numerous changes to policy. In order to reduce the number of issues on claims and appeals and their complexity, as well as to improve transparency and accessibility, I recommend that the Panel and the Policy Bureau consider publishing policy in the *Manual* with the actual effective dates of the policy.

- **Apprehension of Bias**  
**Decision No. 2002-2402**

The worker's counsel objected to the participation of the impugned Panel member in the decision arguing that an apprehension of bias

arose due to the prior participation of the Panel member in *Decision No. 93-1687*, which was a case that adopted a test for considering legal costs. The Panel member's past record of rulings on legal costs and his background representing employers were, according to the representative, evidence of bias.

The Reconsideration Panel upheld the Panel's determination in *Decision No. 2001-1600*. The Reconsideration Panel stated that participation of a Panel member in a case that sets out a particular principle does not necessarily mean that there is a reasonable apprehension of bias. This practice is consistent with guidelines established in the Appeal Commissioners' Code of Conduct, which stipulate that a reviewing Panel is empowered to determine if a real or apparent conflict of interest exists: (*Appeal Decision No. 33* - Appendix "L" item #2.7).

Counsel's submissions concerning the Panel member's background and training were discounted as having little substance or merit due to the accepted policy for the selection of Appeal Commissioners. With regard to whether there existed an institutional bias in this case, the Panel stated:

...The Appeal Division is a separate division of the Workers' Compensation Board, accountable to the Board's governing body (the Panel of Administrators) with respect to administrative issues. The Appeal Division is structured in accordance with the provisions of the *Act* and operates independently with respect to its quasi-judicial functions in deciding appeals under the *Act*....

- **Inherent Jurisdiction of the Review Board and the Appeal Division**  
***Decision No. 2002-2964***

The worker's claim was accepted for a disc protrusion at L5-S1 and chronic pain. In a Board decision dated June 8, 1998, the worker's pension was reduced from 10% of his total impairment to 5%. The worker appealed this decision to the Review Board and in the course of these proceedings, the Panel identified an issue of a psychological disability. The Review Board obtained evidence with respect to this

issue and provided the employer with an opportunity to comment on the new evidence. Subsequently, the Review Board held that the worker had a significant psychological disability.

The employer requested a reconsideration of *Decision No. 2002-0770* on the grounds that the Review Board did not have jurisdiction to make a finding on the worker's psychological disability. The Appeal Division Reconsideration Panel, in part, concluded:

I am persuaded on a purposive reading of the *Act* that the legislature intended the Review Board to have the authority to fully consider whether and to what extent the worker was disabled as a result of the compensable injury, and to make an award based on that conclusion. Often an appeal panel will refer a matter back to the Board to adjudicate whether it should be included as part of the compensable claim, but not always. Sometimes, the evidence is sufficient to make a decision, or the panel will seek the necessary evidence, as it did in this case.

The employer's representative also submitted that the Appeal Division Panel committed an error of law going to jurisdiction when it ignored the jurisdictional issue. The employer's representative reasoned that since there had been no prior decision from any level of adjudication on this issue and there had been no appeal on this issue, the Review Board lacked jurisdiction to consider the matter in accordance with section 90 of the *Act*.

The Reconsideration Panel acknowledged the practical considerations for a Panel to consider when deciding whether to refer an issue to the Board. However, it was concluded that the Review Board or the Appeal Division, based on the following reasoning, committed no jurisdictional error:

'Decision' in section 90 is capable and it should be read as including all issues that are inherent in the appeal before the panel. It should not be interpreted or limited to the issues contained in a document produced by the Board and described as a decision. The Review Board's

jurisdiction has to include the authority to conclude that the Board erred in adjudicating the issues the Board identified but also the authority to conclude that the Board missed an issue that is properly part of the 'decision' being appealed.

## **(I) Section 96(4) Referrals**

Section 96(4) of the *Act* provides that the Board President has the authority, within 30 days of a finding of the Review Board, to refer the finding to the Appeal Division for redetermination on the grounds of an error of law or contravention of a published policy of the Governors (Panel of Administrators). The Appeal Division, when determining referrals by the President in accordance with section 96(4), is fulfilling its responsibility under the *Act* to provide interpretive guidance to the worker's compensation system.

In 2002, the Appeal Division received six section 96(4) referrals from the President with respect to Review Board findings. This compares to four in 2001, nine in 2000, six in 1999, four in 1998, three in 1997, and seven in both 1996 and 1995, two in 1994, and four in 1993.

Brief summaries of the section 96(4) decisions rendered in 2002 are as follows:

- **Whether Exposure to Asbestos of Causative Significance**  
***Decision No. 2002-0146/0147***

A Medical Review Panel concluded that the worker's chronic obstructive pulmonary disease was 90% due to his smoking and 10% due to his exposure to asbestos and other dust in the workplace. The Panel considered whether the Review Board erred in law and contravened policy when it determined that the Board must accept 10% of the responsibility for the disease. The Panel held that the role played by the workplace dust was negligible and not of causative significance. It was noted that the decision was not based on the premise that a set percentage of contribution is required in order for a particular case to be more than negligible.

- **Policy #29.30 – Bronchitis and Emphysema**  
**Decisions No. 2002-0415/0416**

The worker was a welder in various industries from 1963 to 1985. He also had a long-standing cigarette smoking history. The worker requested benefits for his emphysema condition. Item #29.30 of the RSCM provides that when determining a claim for emphysema, "a history of heavy or significant cigarette smoking raises a strong inference that the worker's condition is due to smoking and not to the nature of the employment". But, the policy goes on to state that "against this inference must be weighed any evidence which supports the claim, but the inference will not be rebutted where the opposing evidence is weak or conflicting". The Review Board found that 10% of the respiratory condition was due to exposure to welding fumes in the workplace and the claim was accepted with proportionate benefits. The President referred the finding to the Appeal Division.

The Appeal Division Panel agreed with the President that the test of whether an occupational disease is due to the nature of employment is whether the workplace exposures were a significant contributing factor. Therefore, it was an error of law for the Review Board to apply proportionate benefits. If the worker meets the causative or material significance test then he is entitled to have the claim accepted.

- **Vocational Rehabilitation Benefits**  
**Decisions No. 2002-2290 and 2002-2291**

A marine worker, who had a lengthy history of previous soft tissue back injuries, brought a claim for a lumbar spine sprain in 1998. A Board physician stated that the worker was potentially at risk of developing a permanent functional impairment should he return to full pre-injury duties. As a result, the worker was provided with rehabilitation assistance in accordance with the Board's preventative mandate.

In February 2000, the worker suffered another work-related soft tissue back injury, which was accepted by the Board. In February 2001, the Board determined that the worker was fully recovered from his 1998 soft tissue injury and a continuation of vocational rehabilitation services was denied.

The Review Board accepted medical evidence, which supported a finding that the worker was at undue risk of a permanent disability if he returned to his pre-accident employment. The Review Board noted that the Board had granted rehabilitation assistance on a preventative basis in the past and that item #86.30 of the RSCM allowed preventative rehabilitation for workers at risk of permanent disability. Section 16 of the *Act* was found to be sufficiently broad to accommodate the provision of vocational rehabilitation assistance on this basis.

The Panel determined that item #86.12 clearly allowed the Board to provide vocational rehabilitation when the medical evidence indicates a potential problem in returning to pre-injury employment. As a result, the Panel held:

In the circumstances of this case I can find no error of law or contravention of policy. The Review Board agreed with the Board's original decision on rehabilitation assistance in this case. Since vocational rehabilitation on a preventative basis is provided in Board policy I agree with the Review Board panel that section 16 of the *Act* is 'sufficiently broad' to accommodate this type of vocational rehabilitation.

- **Reimbursement for Accountant fees**  
**Decision No. 2002-0885**

The worker disputed the earnings used by the Board to calculate his pension. The Review Board allowed the appeal and found that the worker was entitled to costs associated with obtaining reports from an accountant based on section 7 of the *Workers Compensation (Review Board) Regulation*.

The Appeal Division Panel determined that the Review Board committed an error of law with respect to the reimbursement of the accountant fees. Section 7 was quite specific and restrictive with respect to the Review Board's authority. The matter was referred back to the Review Board in accordance with section 91(2) of the *Act*. The Panel also noted that the section 96(4) referral may have been motivated by the

amount of the accountant's invoice. If so, this, according to the Panel, would be an inappropriate use of section 96(4) referrals.

- **Recovery of Overpayment**  
**Decision No. 2002-0974**

The worker's wage loss benefits were commenced on an interim basis and the final rate was lower than the provisional calculation. The Review Board found that monies paid to the worker on the basis of a provisional wage rate pursuant to item #66.12 in the RSCM were not recoverable. The issue was brought to the Appeal Division and the Chief Appeal Commissioner referred the policy issue to the Panel of Administrators. The policy was amended so that no recovery of an overpayment, subject to some exceptions, would be made if the worker's interim payments were higher than the final wage loss rate.

The President referred the case back to the Appeal Division to determine whether there was any recovery of benefits based on the facts of this case. The Panel concluded, in light of the criteria set out in the amended policy, that the worker was not obliged to repay the benefits.

## **8. POLICY ISSUES**

The following decisions were among the more significant decisions referred by the Chief Appeal Commissioner to the attention of the Panel of Administrators in 2002:

- **Interpretation of Policy #29.30**  
**Decision No. 2002-0415/0416**

The worker was a welder and cigarette smoker, who developed emphysema. Item #29.30 of the RSCM provides that "a history of heavy or significant cigarette smoking raises a strong inference that the worker's condition is due to the smoking and not to the nature of employment". A Panel must weigh this inference with any evidence that supports the claim but "the inference will not be rebutted where the opposing evidence is weak or conflicting". The Review Board concluded

that 10% of the worker's respiratory condition was due to employment and proportionate benefits were allowed.

The Appeal Division Panel held that the test to consider is whether the workplace exposures were a significant contributing factor. The Panel noted that item #29.30 was based on medical evidence obtained in 1975 and suggested that there may be reason to review the policy in light of more current information about occupational exposure exacerbating the effects of smoking. It was also noted that the policy's approach to multiple causes of occupational diseases was to determine whether the work was a material and significant cause, which applied the *de minimis* principle. The Panel stated that this approach to multi-causality was not consistent with item #29.30. It was stated that to establish a "strong inference" in favour of cigarette smoking in claims for compensation for emphysema and bronchitis set a very different and higher standard of proof than the significant cause test.

- **Medical Malpractice and Compensable Injury**  
**Decision No. 2002-0607**

The worker suffered a compensable injury to his back. A civil action was commenced due to alleged medical malpractice during back surgery.

The Panel reviewed the approach taken by the Ontario Workplace Safety and Insurance Tribunal, which is that benefits continue to be payable notwithstanding the negligent medical treatment. The Ontario Tribunal reasoned that the disability resulted from the initial work injury, however, the statutory bar to a legal action did not arise, as it cannot be said the worker was in the course of his employment at the time of the medical treatment. The Appeal Division Panel suggested that it would be more appropriate for a new approach to be introduced by the legislature or a policy amendment. The Panel held that the plaintiff was a worker and that his injuries arose out of and in the course of his employment at the time of the surgery.

An Appeal Division Panel in *Decision No. 2002-3030* considered the same issue and reached a different conclusion on December 2, 2002. The Panel, in consideration of a similar fact scenario found in *Decision*

No. 2002-0607, concluded that the plaintiff was a worker at the time of the alleged medical injury but was not in the course of her employment at the time of the surgery.

The Panel stated that:

If it is the intent of the legislature and/or the Board that these injuries have the status of injuries arising out of and in the course of employment, clear policy direction, or more likely, statutory amendment may be necessary. In the absence of such direction, I find that the alleged injury arose out of the employment in that there remained a sufficient work connection to establish this aspect of the test; I find, however, that it did not arise in the course of employment.

Thus, in accordance with *Decision No. 2002-3030*, an alleged injury during surgery is a compensable consequence for which the Board pays compensation benefits. The Panel observed that there was a question as to whether the Board would retain a subrogated right of action if the worker "chose to start a civil action after receiving compensation for a treatment injury. And, legislative amendments or specific policy may be necessary to address this issue".

- **Legal Costs in Section 11 Matters and GECA**  
***Decision No. 2001-0965A***

An Appeal Division Panel issued a section 11 certificate and counsel subsequently requested the payment of legal costs. The Panel concluded that as its earlier decision was a final and conclusive decision, it had no jurisdiction to re-open the section 11 determination and make findings with respect to costs. The Panel indicated that it could have entertained the request had it been made in submissions leading to the section 11 determination. A claims matter was distinguished from a section 11 award, as item #100.60 in the RSCM permitted the Appeal Division to consider costs by way of a supplementary decision. There was no similar provision for costs or reimbursement of expenses in section 11 matters.

- **Section 11 – Piercing the Corporate Veil**  
**Decisions No. 2002-1563 and 2002-1564**

This was the first three-person non-representational Panel of the Appeal Division to address the status of a principal of a corporation as a defendant with respect to a section 11 determination. The Panel was unable to reach a consensus on the appropriate interpretation of Policy No. 20:30:30 of the *Assessment Policy Manual (APM)*, which deals with registration requirements of limited companies. The Policy incorporated principles set out in *Decision No. 335*, 5 WCR 101, with respect to an injury to an active principal of a company that was not registered with the Board.

The Panel's divergence of opinion arose in the interpretation of Policy No. 20:30:30 of the *APM*. Policy No. 20:30:30 stipulates that an active principal of a private company not registered with the Board is not entitled to compensation benefits. As a result of finding that the defendant was acting as a principal of an unregistered company at the time of the incident, the majority Panel concluded that the defendant's actions did not arise out of and in the course of employment, as he was not a worker.

The minority interpreted the two principles set out in *Decision No. 335* narrowly and suggested that piercing of the corporate veil should only be considered when a principal of a limited company fails to register a corporation with the Board and then applies for workers' compensation benefits. However, the policy did not address the need to pierce the corporate veil "upon the occurrence of an alleged injury". The minority Panel was of the view that if Policy No. 20:30:30 was not viable with respect to piercing the corporate veil upon an application for compensation, then the policy should be declared contrary to the *Act*. The minority Panel requested that the Chief Appeal Commissioner refer the policy to the Panel of Administrators for clarification.

- **Section 11 - Personal Service Corporations**  
**Decision No. 2002-1561**

The plaintiff and his wife were officers of a limited company that was contracted to provide management and administrative services for a

grocery store. The grocery store was registered with the Board. The defendant's company claimed that the plaintiff was a worker of his limited company and driving was a business-related activity, as demonstrated by business expenses, tax returns and insurance documents. The plaintiff countered that his limited company was not an independent firm and he was not its worker in accordance with the provisions of the Act. His position was that he was the worker of the grocery store and his employment had not begun for the day when the accident occurred. He relied on Policy No. 20:30:20 in the APM and submitted that a "personal service corporation" was not required to register with the Board.

APM, Policy No.20:30:20 stipulates that a limited company is required to register as an employer with the Board and its principals are considered workers of that company. However, there is an exemption from the registration requirements for "personal service corporations". The policy states, in part, that:

...a personal service corporation for this purpose is one where no help other than the principal active shareholders are employed, and if the firm were not incorporated, the principal active shareholders would clearly be workers and fall into the worker category. If, without incorporation, the firm would be a labour contractor, it would not be considered a personal service corporation.

The plaintiff was found to be a worker of the grocery store under the Act. With respect to the plaintiff's incorporation, it was held that officers would fall into the worker category if the firm were not incorporated. The Panel's interpretation of the policy was that principals of personal service corporations are treated like workers of the firm that hires them. The Panel referred to APM, item #40:10:40, which states, in part:

...the effective date of registration for a labor contractor is the date their request for registration was received by the Board. Therefore, the earnings of the contractor prior to be effective date of registration must be included in the Assessable Payroll of the employer.

The Panel noted that the policy could be expressed more clearly:

...it is not entirely clear, the policy appears to pierce the corporate veil and treat the active principals as workers of the firm that hires them through their personal service corporation.

The policy would be clearer if it specified the firm hiring the personal service corporation is required to pay assessments...

- **Amendments to Schedule "B" and Policy**  
**Decision No. 2002-2572**

The worker claimed compensation for shoulder tendonitis on December 27, 1999, which arose on December 10, 1999. The Panel of Administrators amended Policy No. 27.20 and approved a change to item 13(b) of Schedule B of the Act by Resolution dated December 17, 1999. The Resolution took effect thirty days after publication in the *British Columbia Gazette*, Part II Vol. 43 No. 3. Consequently, the changes to Policy No. 27.20 and Schedule B were not in effect and could not be considered until March 29, 2000.

The employer's representative claimed the Appeal Division Panel breached the rules of natural justice or committed an error of law going to jurisdiction because it applied Policy No. 27.20 dated December 1999 to a December 1999 injury; however, the policy considered was not effective until March 29, 2000.

Applying a "patently unreasonable" standard, the Reconsideration Panel found there was an error of law going to jurisdiction. The Reconsideration Panel stated that the confusion may have arisen due to the date on the policy, which was not consistent with its effective date. The Panel provided the following comments and recommendations:

... As above the date published with item #27.20 in the Manual coincides with the date of the Panel resolution, December 1999. I say coincides because other explanations are also possible. A review of various

releases of amendments to the Manual suggests that the date in the "footer" of the Manual may also be the date of an administrative action to record the change in policy. I also note that the changes to item #27.20 were issued in August 2000 so the date recorded in the Manual does not appear to relate to the date of release to the public. In short, the dates published in the Manual as "footers" may have some unknown administrative function but they do not represent the effective date of policy. Finally, at least some policy includes a statement about when the policy is effective (see item #39.44, for example).

There is no information regarding the effective date of the specific policy in the Manual and, in fact, the information in the Manual is misleading. Yet this information is critical to the proper adjudication of claims and appeals. And it may be unrealistic to expect some members of the workers' compensation community to be able to track changes in policy through Panel resolutions and even the *Gazette*. It is not clear what value there is in publishing policy with the date of some unknown administrative function but there is considerable value in publishing policy with actual effective dates. This is especially true when there are significant and numerous changes to policy.

In order to reduce the number of issues on claims and appeals and their complexity, as well as to improve transparency and accessibility, I recommend that the Panel and the Policy Bureau consider publishing policy in the *Manual* with the actual effective dates of the policy.

## 9. PUBLICATION OF APPEAL DIVISION DECISIONS

There were fifteen Appeal Division decisions published in the *Workers' Compensation Reporter*, Volume No. 18, in 2002.

The published decisions are available online at [www.worksafebc.com](http://www.worksafebc.com). In addition, Appeal Division decisions issued from January 1, 2000 are available online at the same website.

The following summaries are provided for informational purposes with respect to the decisions that were published in 2002:

- **Interpretation of Policy #15.20  
Arising Out of and In the Course of Employment  
Decision No. 2001-0939, 18 W.C.R. 25**

The worker suffered an onset of pain while driving his truck shortly after unloading gasoline. The issue was whether the injury arose out of and in the course of employment. Policy #15.20 of the RSCM stipulates that motions which are incidental to the job will not result in compensation if the worker is engaged in the incidental activity. The Panel concluded that it was unlikely that the disc protrusion occurred by reason of the worker's employment activities on the date of the pain. Rather, it was found to be coincidental and other than timing of the onset, there was nothing to connect the onset of pain with the employment.

- **Pension related to Raynaud's Phenomenon  
Appeal Division decisions #2001-2111/2112 (26 October 2001)**

The worker was a millwright welder in 1997 when he applied for compensation related to Raynaud's Phenomenon in his left index finger. The Board accepted his claim but determined he would not receive a pension.

The Appeal Division panel concluded it was a contravention of governors' policy for the Review Board to rely upon a 1998 version of item #39.44 to allow the worker's appeal. Consequently, section 96(4) of the Act required the Appeal Division panel to redetermine the Review Board finding.

Since the validity of item #39.44 was raised as an issue in these proceedings the panel considered what standard of review was appropriate. The panel adopted the highest deferential standard of review, often used by courts in reviewing decisions of expert administrative tribunals. The standard adopted for reviewing the lawfulness of policy was whether the policy is a patently unreasonable interpretation of the statute.

The Appeal Division panel conducted an extensive review of Royal Commission reports, and documents of a former board vice-chair. The panel concluded the purpose of section 23(1) is clear and a worker does not require a loss of earnings in order to be entitled to a pension pursuant to that provision. That aspect of item #39.44 (1995), which precludes a pension where the worker had returned to his/her normal or equal paying occupation, was found to involve a patently unreasonable interpretation of section 23(1).

- **Section 11 Determination**  
**Arising Out of and in the Course of Employment**  
**Decision No. 2001-2240, 18 W.C.R. 71**

The defendant was a taxi driver, who employed spare drivers, but was not registered with the Board and had no personal option protection. The Panel considered the status of the defendant at the time of the accident. It was held that the defendant was an employer and that the failure to obtain personal option protection did not affect his employer status. In addition, the defendant's alleged action arose out of and in the course of employment, which included a "business or trade".

- **Cancellation of Personal Option Protection Coverage**  
**Notification Requirements**  
**Decision No. 2001-2434, 18 W.C.R. 87**

X was a self-employed roofing contractor, who did not have personal option protection coverage when he suffered a serious head injury at work. The coverage had been cancelled due to non-payment. X argued that the doctrine of legitimate expectations applied and that the Board failed to comply with the requirements in Policy No. 20:50:50 of the APM. The Panel found that although the Assessment department did commit a technical breach it was not sufficient to deny natural justice. The Board's requirements were directory, not mandatory and

the failure to follow them did not nullify the personal option protection cancellation. The duty of fairness was fulfilled by the indication on the personal option protection application of the consequences of non-remittance and two written warnings in advance of the cancellation. In turn, the assessment manager's rubber stamp approval and registered mail notification made no substantive difference in the ultimate decision as to whether he had coverage. The doctrine of legitimate expectations did not arise because X was not aware of the requirements in Policy No. 20:50:50 and nothing in the conduct of the collection's officer gave rise to an expectation. The inconsistency between Policy No. 20:50:50 and the practice was inappropriate and should be amended by the Panel of Administrators.

- **Discriminatory Action**  
**Refusal to Perform Unsafe Work**  
***Decision No. 2001-2562, 18 W.C.R. 103***

The worker was required to wear safety boots but refused to wear "common boots" pending replacement of his own, citing safety concerns. The worker was suspended until he wore appropriate footwear. The Panel held that the worker was not exercising a right under section 3.12 of the Regulation to refuse to perform unsafe work. The offer to wear "common boots" was not a "work process" that the worker was to carry out. Rather, the worker refused to comply with the employer's policy regarding safe footwear. Even if the worker was exercising a right to refuse to perform unsafe work, the employer had rebutted the presumption of unlawful discrimination.

- **Whether Exposure to Asbestos of Causative Significance**  
**Section 96(4) Referral**  
***Decision No. 2002-0146/0147, 18 W.C.R. 113***

A Medical Review Panel concluded that the worker's chronic obstructive pulmonary disease was 90% due to his smoking and 10% due to his exposure to asbestos and other dust in the workplace. The Panel considered whether the Review Board erred in law and contravened policy when it determined that the Board must accept 10% of the responsibility for the disease. The Panel held that the role played by the workplace dust was negligible and not of causative significance. It was noted that the decision was not based on the premise that a set

percentage of contribution is required in order for a particular case to be more than negligible.

- **Cross-Examination of Board Expert**  
**Natural Justice**  
***Decision No. 2002-0160, 18 W.C.R. 123***

The worker's representative requested the opportunity to cross-examine a Board orthopedic consultant arising from the fact that two expert medical opinions reached opposing conclusions. The Panel denied the request finding that it was able to assess the weight of the totality of the medical opinions and that the parties had ample opportunity to file written material.

- **Jurisdiction to Review Matters Not Appealed**  
**Reconsideration**  
***Decision No. 2002-0207, 18 W.C.R. 135***

The original Panel concluded that it did not have jurisdiction to review a matter dealt with by the Review Board unless the issue was specifically appealed. The Reconsideration Panel held that the Appeal Division had broad jurisdiction in accordance with section 96(3) of the Act to conduct a full inquiry into all of the issues arising out of an appeal with the objective of facilitating participation of unrepresented parties. Jurisdictional issues related to both the scope of the Panel's authority and issue of access to the Appeal Division. The original Panel misapprehended its jurisdiction and failed to exercise its discretion.

- **Policy #26.55**  
**Aggravation of Pre-existing Condition**  
***Decision No. 2002-0230, 18 W.C.R. 145***

The Panel considered whether the worker's pre-existing eczema condition was aggravated by her employment. Policy # 26.55 indicates that the test is whether the disability would have occurred but for employment. In this case, the disease would not have been disabling in the absence of the work activity.

- **Discriminatory Action Complaint**

- Reverse Onus**

- Decision No. 2002-0458, 18 W.C.R. 149**

The worker alleged that the employer laid him off and berated him publicly because he raised employment related safety concerns. A worker has the burden of proving a *prima facie* case and the reverse onus in section 152(3) then requires the employer to prove that there was no discriminatory action. The Panel held that the applicable test to consider with regard to the employer's actions is the "taint theory" in that the employer's actions cannot be tainted in any way by anti-safety animus.

- **Introduction of Personal Hazard Into the Workplace**

- Personal Property**

- Decision No. 2002-0520, 18 W.C.R. 171**

A bus driver opened his umbrella and lacerated his hand while walking from the transit centre to the bus. The issue was whether the injury arose out of or in the course of his employment in accordance with the presumption found in section 5(4) of the Act. The Panel held that the hazardous umbrella was predominately for the worker's own personal use and the presumption was rebutted

- **Criteria for Adjudicating Infectious Disease Claims**

- Causative Significance**

- Decision No. 2002-0558, 18 W.C.R. 175**

The worker suffered from necrotizing fascitis. Due to the transient nature of the bacteria it was difficult to prove its existence in the workplace. The Panel stated that the test was whether the employment had causative significance in producing the disease. It was concluded that the worker's chronic eczema was aggravated by daily exposure to cement in the workplace. This aggravation was compensable and it caused lesions that made the worker susceptible to infection.

- **Medical Malpractice in Treatment of Compensable Injury**

**Section 11 Determination****Decision No. 2002-0607, 18 W.C.R. 185**

The plaintiff had a compensable back injury and was reinjured during surgery. The issue was whether the plaintiff was a worker at the time of the surgery and whether the surgical injury arose out of and in the course of employment. The Panel held that any subsequent injury due to medical treatment is a direct consequence of the original work injury. There was no break in the chain of causation.

- **Occupational Health and Safety**

**Whether *Kienapple* Principle Applies to Prevention Matters****Decision No. 2002-0636/0637, 18 W.C.R. 209**

The employer appealed the imposition of administrative penalties. Its position was that the Board issued duplicitous orders, contrary to the *Kienapple* principle and *res judicata*. In the *Kienapple* case, the Supreme Court of Canada determined that "the principle of *res judicata* applies when more than one charge is used to describe the same offence. In other words, a person should not be charged and convicted of two offences arising from a set of facts that essentially constitutes one, same action by the person". The Panel held that the *Kienapple* principle was not applicable to workers' compensation enforcement orders and section 2.12 of the Regulation ousts the common law principle of *res judicata*.

- **Schedule "B" Presumption**

**Ankle Tendinitis****Decision No. 2002-1530, 18 W.C.R. 785**

Schedule B was amended eliminating the rebuttable presumption for foot and ankle tendinitis. The new policy required evidence that the condition was caused by the worker's employment. In this case, the Panel was unable to find a "causative relationship between the worker's employment and her ankle pain".

## 10. MATTERS PENDING BEFORE THE APPEAL DIVISION

The table below indicates the matters pending at the end of 2002 as compared to the matters pending at the end of each previous year in the Appeal Division's history. There was a 4% decline in the number of outstanding matters before the Appeal Division in 2002.

### MATTERS PENDING AT DECEMBER 31 OF EACH YEAR

| <b>Matter Type</b>                                | <b>2002</b> | <b>2001</b> | <b>2000</b> | <b>1999</b> | <b>1998</b> | <b>1997</b> | <b>1996</b> | <b>1995</b> | <b>1994</b> | <b>1993</b> | <b>1992</b> |
|---------------------------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Section 91 appeals from Review Board              | 1017        | 997         | 973         | 953         | 902         | 821         | 644         | 627         | 387         | 426         | 490         |
| Section 96(4) President's referrals               | 0           | 4           | 6           | 3           | 3           | 1           | 1           | 3           | 1           | 2           | 0           |
| Prevention – general                              | 0           | 4           | 1           | 17          | 59          | 35          | 51          | 39          | 49          | 38          | 72          |
| O.H.S. (Bill 14)                                  | 18          | 56          | 47          | 16          | N/A         | N/A         | N/A         | N/A         | N/A         | N/A         | N/A         |
| Section 39(1) employer relief of costs            | 689         | 670         | 2347        | 2590        | 1307        | 462         | 421         | 30          | 26          | 39          | 30          |
| Criminal injury matters                           | 4           | 32          | 49          | 70          | 94          | 69          | 35          | 18          | 9           | 4           | 6           |
| Section 47(2) employer charged with costs         | 21          | 22          | 16          | 20          | 13          | 8           | 15          | 7           | 5           | 5           | 9           |
| Assessments                                       | 39          | 26          | 47          | 37          | 28          | 23          | 22          | 140         | 24          | 27          | 16          |
| Section 10(8) transfer of claim costs             | 2           | 2           | 2           | 1           | 10          | 0           | 4           | 5           | 5           | 4           | 2           |
| Section 11 certificates                           | 132         | 133         | 141         | 126         | 86          | 81          | 65          | 56          | 66          | 56          | 47          |
| Reconsideration - Appeal Division decisions       | 38          | 37          | 46          | 45          | 37          | 52          | 54          | 46          | 56          | 44          | 39          |
| Reconsideration - former commissioners' decisions | 1           | 0           | 2           | 3           | 7           | 6           | 8           | 16          | 7           | 6           | 10          |
| Extension of time to appeal                       | 77          | 143         | 111         | 88          | 104         | 97          | 70          | 27          | *           | *           | 5           |
| Other matters                                     | 0           | 0           | 0           | 0           | 0           | 0           | 0           | 0           | 0           | 0           | 6           |
| <b>TOTAL</b>                                      | <b>2038</b> | <b>2126</b> | <b>3788</b> | <b>3969</b> | <b>2650</b> | <b>1655</b> | <b>1390</b> | <b>1014</b> | <b>635</b>  | <b>651</b>  | <b>732</b>  |

\*Extension of time to appeal matters were not separately tracked in matters pending in 1993 and 1994.

## **Transition to WCAT**

The Appeal Division will continue to operate until March 2, 2003. On March 3, 2003, WCAT will become the final level of appeal as provided for in Bill 63. All matters that have statutory due dates prior to March 3, 2003 will be considered as Appeal Division cases and the 90-day statutory time period to determine each matter will continue to apply.

On January 21, 2003, the following estimates were made with regard to the Appeal Division's inventory:

- The number of cases that will continue to be adjudicated as Appeal Division matters after March 3, 2003 is approximately 203. It is anticipated that these cases will be completed by April 2003.
- On February 28, 2003, there will be approximately 195 cases ready for assignment to Panels for adjudication. Based on current projections, these decisions should be completed by June 2003. These matters will be adjudicated as WCAT matters.
- There will be approximately 1550 cases at the Appeal Division for which submissions will not be completed on or before February 28, 2003. These matters will also be adjudicated as WCAT matters.
- The matters that are adjudicated as WCAT matters will not be subject to the 180-day time frame for decision-making set out in Bill 63. They will be determined in accordance with the legislative requirements in Bill 63 to apply Board policy.

## **11. ORAL HEARINGS**

The Appeal Division held 97 oral hearings during 2002. Eighty-two were heard by non-representational Appeal Commissioners sitting alone. Fifteen were heard by panels of three Appeal Commissioners.

The total number of decisions issued in 2002 was 3185; oral hearings were held in approximately 3% of cases. This represents a decrease from the figures of 4.2% in 2001, 7.7% in 2000, 7.6% in 1999, 7% in 1998, and

7.4 % in 1997. The Appeal Division held oral hearings in 8% of its cases in 1996, 7.4%, in 1995, 9% in 1994, and 10% in both 1993 and 1992.

Of the 97 oral hearings during 2002, 74 concerned claims issues, 17 related to employer prevention penalty appeals, three related to employer assessment appeals, and three were section 11 applications.

Seventy-three of the oral hearings were held at the Richmond offices of the Board. Twenty-four were held in locations around the province outside the lower mainland: Sidney (1), Trail (1), Abbotsford (3), Kamloops (9), Kelowna (3), Nanaimo (4) and Prince George (3).

The following table provides information regarding the number of oral hearings held outside the Lower Mainland since 1992:

| Year | Total oral hearings | Hearings held outside the Lower Mainland |                               |
|------|---------------------|------------------------------------------|-------------------------------|
|      |                     | Number                                   | As a % of total oral hearings |
| 2002 | 97                  | 24                                       | 25%                           |
| 2001 | 108                 | 40                                       | 37%                           |
| 2000 | 159                 | 53                                       | 33%                           |
| 1999 | 154                 | 58                                       | 38%                           |
| 1998 | 143                 | 50                                       | 35%                           |
| 1997 | 130                 | 44                                       | 34%                           |
| 1996 | 158                 | 45                                       | 28%                           |
| 1995 | 118                 | 28                                       | 24%                           |
| 1994 | 140                 | 34                                       | 24%                           |
| 1993 | 184                 | 49                                       | 27%                           |
| 1992 | 202                 | 24                                       | 12%                           |

In 2002 interpreters were utilized in 12 oral hearings, in the following languages: Punjabi (7), Portuguese (1), French (1), Polish (1), Tagalog (1) and Spanish (1). Interpreters were used in 11 hearings in 2001, 16 hearings in 2000, 9 hearings in 1999, 9 hearings in 1998, 6 hearings in 1997, 14 hearings in 1996, 10 hearings in 1995, and 16 hearings in 1994.

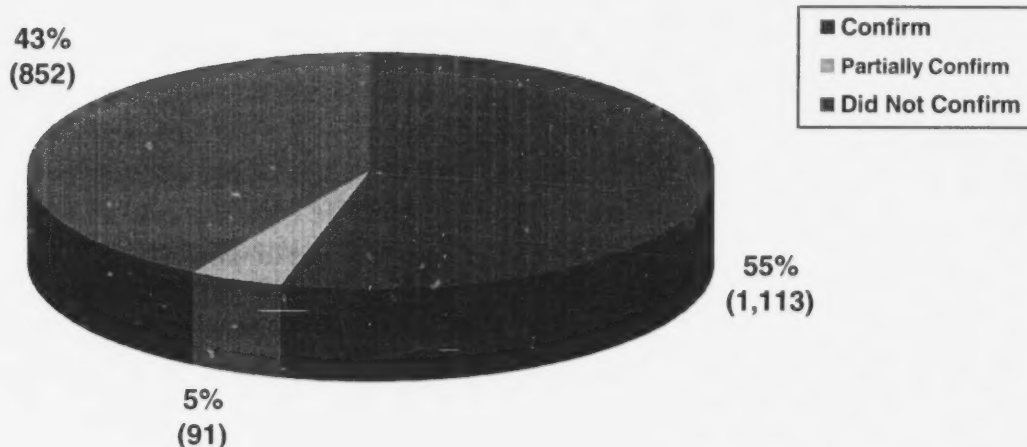
## 12. MEDICAL REVIEW PANEL APPEALS

Effective January 9, 2003, 2,056 Medical Review Panel certificates were issued on appeals from Appeal Division decisions since June 1991. This is 145 more certificates than had been issued as of January 17, 2002. As of January 9, 2003, there are a further 188 appeals proceeding to Medical Review Panels from Appeal Division decisions.

The 2,117 Appeal Division decisions which have proceeded, or are proceeding to a Medical Review Panel represents approximately 15% of decisions on section 91 appeals over the past ten years.

Of the 2,056 completed Medical Review Panel appeals, 70 await implementation by the Board's Compensation Services Division. Until that occurs we cannot state whether the Appeal Division decisions in those cases have been confirmed, partially confirmed, or not confirmed. However, 1,986 Medical Review Panel certificates have been implemented with the following results. The Appeal Division decision was confirmed in 1,113 cases (55%), partially confirmed in 91 cases (5%), and not confirmed in 852 cases (43%).

**MEDICAL REVIEW PANEL APPEALS FROM  
APPEAL DIVISION DECISIONS:  
JUNE 1991 TO 2002**



### 13. JUDICIAL REVIEW

The courts issued seven decisions in 2002 on judicial review petitions arising from Appeal Division decisions. In five of the cases, the Supreme Court of British Columbia held that the Appeal Division's decisions were not patently unreasonable.

In one case, the court concluded that the Appeal Division's determination was patently unreasonable and this decision was appealed by the Board's legal department to the British Columbia Court of Appeal. On January 21, 2003, the Court of Appeal reversed the Supreme Court decision finding that the Appeal Division's decision was patently unreasonable.

In *Burnett v. British Columbia (Workers' Compensation Board)*, the Supreme Court of British Columbia concluded that as the issue before it was whether section 17(4) of the *Workers Compensation Act* violated section 15 of the *Charter of Rights and Freedoms*, the standard of review was that of correctness and not the patently unreasonable standard. The court allowed the petition for review on July 25, 2002. The Board's legal department has appealed this decision to the British Columbia Court of Appeal and the matter will be heard in 2003.

The following is a brief case synopsis of the Appeal Division decisions that were considered by the Supreme Court of British Columbia in 2002:

- ***Seime v. British Columbia (Workers' Compensation Board)***  
***Workers Compensation Act – Moving Expenses***

The worker was employed as a painter. In 1993, he requested benefits for an injury to his eyes resulting from exposure to paint fumes. A Medical Review Panel (MRP), in a decision dated July 15, 1996, held that the worker was totally disabled from January 1993 and ongoing due to a psychological condition. Subsequently, the worker raised several issues with respect to his wage rate and entitlement to expenses. The Appeal Division in *Decisions No. 98-1319, 99-1530 and 2000-2007*, considered these issues.

The worker was not satisfied with the Appeal Division decisions and sought judicial review. In a British Columbia Supreme Court judgment dated January 14, 2002, Mr. Justice Cullen dismissed the worker's petition for all of the issues except that found in *Decision No. 99-1530*. Specifically, the court held that the Appeal Commissioner's reasoning for denying the payment of moving expenses was patently unreasonable. Justice Cullen stated that the Commissioner used an objective test to determine whether it was reasonably necessary for the worker to move his residence; however, the correct test was "whether, in view of his psychological condition, it was reasonably necessary".

The Board's legal services department appealed to the British Columbia Court of Appeal. In a decision dated January 21, 2003, the Court of Appeal concluded that the Supreme Court Justice erred in his application of the patently unreasonable test.

- ***Jones v. Workers' Compensation Board***  
***Workers Compensation Act - Implementation of Medical Review Panel Certificate***

A Medical Review Panel (MRP) determined that the worker did not have an injury related psychological condition that played a significant role in his compensable low back condition. Subsequently, the Board determined that the worker was not totally disabled from employment and his loss of earnings pension was replaced with a functional impairment award. An Appeal Division Panel, in *Decision No. 2001-0601*, concluded that the worker was capable of returning to employment and confirmed the functional impairment pension award.

On June 3, 2002, the British Columbia Supreme Court dismissed the petition for review. The court reasoned that the Appeal Division's determination was not "openly, evidently and clearly unreasonable" and could not be upset by judicial review.

- ***Sofiak v. Workers' Compensation Board***  
***Workers Compensation Act – Injury Arising from Employment***

In *Decision No. 2000-1580*, an Appeal Division Panel determined that there was insufficient evidence to find that the worker's back injury arose out of and in the course of his employment.

The worker brought a petition for judicial review to the British Columbia Supreme Court on April 16, 2002. In dismissing the petition for judicial review, the court stated that there was evidence before the Appeal Division that provided a rational basis for its decision. However, the court expressed concerns with respect to inferences drawn by the Appeal Division from the evidence. As a result, the Appeal Division considered an application for reconsideration of *Decision No. 2000-1580*.

- ***Burnett v. Workers' Compensation Board***  
***Section 15 of the Charter and section 17(4) of the Workers Compensation Act***

On July 25, 2002, the British Columbia Supreme Court allowed a petition for judicial review of Appeal Division *Decision No. 2000-0440*. Specifically, the court found that section 17(4) of the *Workers Compensation Act* (Act) discriminated against the widow in this case on the basis of her age, which was contrary to section 15(1) of the Charter.

The widow's spouse died in 1980 and she was left with a 15-year-old dependent child. The Board granted survivors' benefits to the widow and the child in the form of a monthly pension. The child's benefits continued until he reached the age of independence in 1985. For reasons unrelated to the judicial review, the widow's benefits were terminated in the 1980's and reinstated in 1997.

As the widow's child was no longer a dependent, the Board concluded that section 17(4) benefits were applicable. Section 17(4) stipulates that the benefits are to be recalculated for a surviving spouse with children who are no longer dependent, on the basis of a formula that puts them in the category of a surviving spouse without dependent children. The

applicable benefit scheme is found in section 17(3)(c) to (e). In 1985, when the child was no longer considered to be a dependent, the widow was under the age of forty. Therefore, effective that date, the Board recalculated her benefits under section 17(3)(d), which resulted in the termination of her monthly pension and the payment of a lump sum award. Had the worker been 40 or older in 1985, she would have received a lifetime pension.

The court stated that the standard of review with respect to a *Charter* issue was that of "correctness" and not the "patently unreasonable" standard. The court found that the Appeal Division's decision was not correct. It was held that the Appeal Division's underlying presumption that widowed parents under 40 (when their children cease dependency) will generally have better employment and income replacement prospects than those over 40 appeared unsupported in fact or reason. While the actual dependency of the child may cease, the accumulated deterrents to the widow built during those years of dependency will remain. The court stated that the actual circumstances and needs of the group under the age of 40 were not adequately addressed by the legislative scheme. It was stated that the widow's self-respect inherent in her dignity as a person is lessened by the failure of the legislation to reflect concern, respect and consideration to the under 40 group of which she is a member.

The Board's legal department has appealed this decision to the British Columbia Court of Appeal and it is scheduled to be heard on April 1, 2003.

- ***Masales v. Workers' Compensation Board***  
***Workers Compensation Act – Determination of Average Wages***

In *Decision No. 2001-0590*, a Panel of the Appeal Division considered whether a deceased worker's wage rate for pension purposes was properly calculated in determining the widow's monthly survivor's benefits. Consideration was given to dividends, drawings against shareholder's loans and retained earnings in the calculation of the wage rate.

On July 5, 2002, the Supreme Court of British Columbia dismissed the widow's petition for judicial review. The court held that the Appeal Division's decision was not patently unreasonable.

- ***Buzunis v. Workers' Compensation Board et al.***  
***Criminal Injury Compensation Act – Compensation for pain and suffering***

Mr. Buzunis was assaulted on July 15, 1993. He filed a claim under the *Criminal Injur Compensation Act* while also pursuing a legal action against the assailant. The legal action was undefended and Mr. Buzunis was awarded \$60,549.17, which included \$15,000.00 for pain and suffering, and loss of enjoyment of life. After a number of appeals and rehearings, Mr. Buzunis was awarded \$5,000.00 pursuant to the *Criminal Injury Compensation Act*. The Appeal Committee and the Appeal Division confirmed that award.

Mr. Buzunis' position before the court was that to limit the damages by the "one fifth rule" was patently unreasonable. In addition, it was submitted that the Board and appeal bodies violated the rules of natural justice by failing to hold an oral hearing or allow the cross-examination of a Board psychologist.

The petition for judicial review of Appeal Division *Decision No. 2001-0725* was heard on September 17, 2002. The court provided its judgment on October 30, 2002. Mr. Justice Cullen found that the Board decisions were protected by a privative clause and the standard of review was "patent unreasonableness". The judge concluded that the application of the "one fifth rule" was not patently unreasonable. He also held that neither the Board nor the appeal bodies' decisions breached the rules of natural justice when they denied an oral hearing.

- ***Greaves v. Fearon and Workers' Compensation Board***  
***Workers Compensation Act – Section 11 determination***

Mr. Fearon was injured in a motor vehicle accident and he brought a civil action against Mr. Greaves for damages. Mr. Greaves applied to the Appeal Division for a certificate under section 11 of the *Act*. The

Appeal Division Panel concluded that Mr. Greaves was not a worker or an employer in the course of his employment.

ICBC, through their insured Mr. Greaves, brought a petition for judicial review of the Appeal Division's section 11 certification alleging that the decision was patently unreasonable.

In a decision of the Supreme Court of British Columbia dated November 14, 2002, Mr. Justice Bouck dismissed the Petition based on a determination that the decision was not patently unreasonable.

As this is the Appeal Division's final Annual Report, a list of all judicial reviews from the inception of the division in 1991 is provided for informational purposes:

- ***Burlington Northern Railroad v. B.C. (W.C.B.) et al., (1992) B.C.S.C.***

Petition for judicial review of a rehearing by the Appeal Division. Petition dismissed.

- ***Electrolux Corp. of Canada v. B.C. (W.C.B.), (1993) B.C.C.A.***

Board appeal from a petition for judicial review that set aside a Board decision and remitted the matter back to the Board for adjudication. Appeal allowed.

- ***Pioneer Plumbing & Heating Inc. v. B.C. (W.C.B.), (1993) B.C.S.C.***

Petition dismissed.

- ***Nash v. B.C. (W.C.B.), (1993) B.C.S.C.***

Judicial review of Appeal Division decision, which found that the petitioner was a worker in accordance with the Act. Petition dismissed.

- ***Sound Contracting Ltd. v. B.C. (W.C.B.), (1993) B.C.S.C.***

Employer petition on the grounds that there was no jurisdiction to reconsider the matter after the initial Appeal Division decision and that

there was a reasonable apprehension of bias on the part of a Board officer. Petition dismissed.

- ***Vancouver (City) v. B.C. (W.C.B.)* [1995], 4 W.W.R. 744, 2 B.C.L.R. (3d) 321 (C.A.), rev'g [1994] 4 W.W.R. 518, (1993), 88 B.C.L.R. (2d) 381.**

The British Columbia Supreme Court held that the Appeal Division applied a standard of proof akin to certainty. The Court of Appeal allowed the Board's appeal and ruled that the principle of curial deference should apply.

- ***Bourgeois v. B.C. (W.C.B.)*, (1994) B.C.S.C.**

The petitioner applied for judicial review arising from a section 11 determination that his injuries arose out of and in the course of employment. Petition dismissed.

- ***Slocan Forest Products Ltd. v. B.C. (W.C.B.)*, (1994) B.C.S.C.**

Judicial review of a decision upholding a penalty assessment of a regulation applicable to a forest service road. Petition dismissed.

- ***Fletcher Challenge Canada Ltd. v. B.C. (W.C.B.) et al.*, (1997) B.C.S.C.**

Employer petition for judicial review. The Court found that the decision was reasonable due to the Appeal Division's broad powers to grant curative relief. Petition dismissed.

- ***Streifel v. B.C. (W.C.B.)*, (1997) B.C.S.C.**

Petition to set aside a Section 11 determination that concluded that the petitioner's injuries arose out of and in the course of his employment. Petition dismissed.

- ***Harbour Air Ltd. and Roach v. B.C. (W.C.B.), (1997) B.C.S.C.***

The Appeal Division found the respondent film producer, who was injured in an airplane accident, was not a worker because he was a performance artist. Petition dismissed.

- ***Smith v. B.C. (W.C.B.), (1998) B.C.S.C.***

The Petitioner claimed that the Appeal Division made an error in fact in determining the effective date of his compensation entitlement. Petition dismissed.

- ***Canada Safeway v. B.C (W.C.B.), [1998] B.C.J. No. 2672 (C.A.), rev'g [1997] B.C.J. No. 1490 (S.C.)***

Appeal from a decision of the Supreme Court quashing an Appeal Division decision that held that the Board was not authorized to make a retroactive re-assessment under section 42 of the *Act*. Appeal allowed.

- ***Watford v. B.C. (W.C.B.), (1999) B.C.S.C.***

Petition for judicial review from an Appeal Division decision that an individual was not a worker within the meaning of the *Act*. Petition dismissed.

- ***Suranyi v. B.C. (W.C.B.), (1999) B.C.S.C.***

The worker alleged that the Workers' Compensation Board exercised powers in a manner contrary to the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*. Petition dismissed.

- ***Van Unen v. B.C. (W.C.B.), (1999) B.C.S.C.***

The worker applied for judicial review of six Appeal Division decisions. The Court found that procedural fairness did not require an oral hearing in every instance and the Board did not fetter its discretion by failing to award costs. Petition dismissed.

- ***Greyhound Canada Transportation Corp. v. Brzozowski*, [2000] B.C.J. No. 1184 B.C.C.A., aff'g [1999] B.C.J. No. 2032 B.C.S.C.**

The Court of Appeal found the Board ruling that the employees were analogous to commuting workers rather than travelling sales people was not patently unreasonable. Appeal dismissed.

- ***Demmon v. B.C. (W.C.B.)*, (1999) B.C.S.C.**

The worker petitioned for judicial review of an Appeal Division decision that denied his challenge to the composition of a Medical Review Panel. Petition dismissed.

- ***Boutsakis v. W.C.B. of B.C. et al.*, (1999) B.C.C.A.**

The worker petitioned for judicial review of the Appeal Division decision that denied his claim for hearing loss. Petition dismissed.

- ***Re Kovach*, [2000] S.C.J. No. 3 (S.C.C.), rev'g [1998] B.C.J. No. 1245 (C.A.), rev'g [1995] B.C.J. No. 425 (S.C.).**

Board appeal to the Supreme Court of Canada from a second decision of the British Columbia Court of Appeal. The Court of Appeal had allowed Kovach's judicial review of a certificate issued pursuant to section 11 of the *Workers Compensation Act*. The Court allowed the Board's appeal.

- ***Jackson v. Newton*, (2000) B.C.S.C.**

Judicial review of a section 11 determination that found that the petitioner was not a worker. Petition dismissed.

- ***Alvin v. B.C. (W.C.B.)*, (2000) B.C.S.C.**

The worker's average earnings calculation was based on twelve months' earnings rather than a three-month period of earnings. Petition dismissed.

- ***Atchison v. B.C. (W.C.B.), (2001) B.C.S.C.***

Judicial Review application arguing that the Appeal Division erred in holding that it did not have the jurisdiction to reconsider 1956 and 1957 decisions of the former commissioners on the basis of new evidence. The Court found the Appeal Division had the jurisdiction to reopen its February 2000 decision in order to correct its error. An appeal from Supreme Court decision was heard by the Court of Appeal on December 19, 2002. The court reserved judgement.

- ***Mayden v. B.C. (W.C.B.), (2001) B.C.S.C.***

The Court found there were radical defects with respect to the scope of the judicial review requested, the content of both the Petition and the affidavit in support of the Petition, and the notice provided to the Attorney General. Petition dismissed.

- ***Hansen v. B.C. (W.C.B.), (2001) B.C.S.C.***

Judicial review of an Appeal Division decision which allowed partial reimbursement of the cost of surgical treatment in the United States. Petition dismissed.

- ***Van Unen v. B.C. (W.C. B.), [2001] B.C.J. No. 672 (C.A.) aff'g [1999] B.C.J. No. 1822 (S.C.), Bauman J. leave to appeal to S.C.C. refused [2001] S.C.C.A.***

The worker sought judicial review of decisions of the Appeal Division that disallowed his claim for reimbursement of legal fees. The Court of Appeal found that the Board's reimbursement policy deserved deference and the Board correctly exercised its discretion within the policy. Leave for appeal to the Supreme Court of Canada was dismissed with costs.

- ***Metz v. B.C. (W.C.B.), B.C.S.C.***

The court has not yet considered this petition for judicial review.

- ***Provost v. B.C. (W.C.B.), B.C.S.C.***

The court has not yet considered this petition for judicial review.

- ***Cathcart v. B.C. (W.C.B.), B.C.S.C.***

The court has not yet considered this petition for judicial review.

- ***Dyck v. B.C. (W.C.B.), B.C.S.C.***

The court has not yet considered this petition for judicial review.

